92-17

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

JONATHAN J. POLLARD,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

1. Whether a district court determination that a plea agreement has not been breached is subject to a "clearly erroneous" or a *de novo* standard of review in a case involving undisputed facts.

2. Whether the requirement of *Santobello v. New York*, 404 U.S. 257 (1971), that plea bargains by the government must be fulfilled and will be enforced is displaced in collateral proceedings under 28 U.S.C. § 2255 by a rule that denies enforcement of such commitments except where a defendant is able to establish a *clear* violation of a *definite* promise that was a *significant* inducement to the bargain.

3. Whether the Fifth Amendment to the United States Constitution places special substantive or procedural limits on "wired" guilty pleas—an issue expressly reserved by this Court in *Bordenkircher v. Hayes*, 434 U.S. 357, 364 n.8 (1978)—and, if so, whether the explicit linkage of petitioner's guilty plea to the government's treatment of his seriously ill wife renders petitioner's guilty plea involuntary and therefore unconstitutional in this case.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Jonathan J. Pollard respectfully petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the District of Columbia Circuit.

Petitioner pleaded guilty to transmitting national security information to a foreign government, Israel, in violation of 18 U.S.C. § 794(c), and was sentenced to life in prison. His application for relief from that sentence under 28 U.S.C. § 2255 was denied by the District Court. A divided panel of the Court of Appeals (Silberman, J., and Ruth B. Ginsburg, J., with Williams, J., dissenting) affirmed. Applying the highly deferential standard of reviewing only for

"clear error," the court below deferred to the District Court's conclusion that petitioner's plea bargain with the government had not been violated. It also held that even if the government had breached a material inducement to the plea agreement, such breaches are remediable under § 2255 only if the promise broken was "definite," the inducement "significant," and the breach "clear." The Court of Appeals also affirmed the rejection of petitioner's constitutional challenge to the government's wiring of his plea agreement to its treatment of his seriously ill spouse.

The standard of review and standard for relief applied by the Court of Appeals directly contradict the decisions of other federal courts of appeals and are inconsistent with the decisions of this Court. The decision below with respect to the "wiring" of pleas also presents a significant, recurring and unresolved issue that warrants the attention of this Court.

## OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals, filed March 20, 1992, is reported at 959 F.2d 1011 and reproduced in Appendix ("App.") A, 1a-50a. The opinion of the District Court, filed September 11, 1990, is reported at 747 F. Supp. 797 and reproduced in App. B, 51a-70a.

## JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 2255. The jurisdiction of the Court of Appeals was based upon 28 U.S.C. § 1291. This petition is being filed within the time permitted by the Rules of this Court as extended by the June 10, 1992 order of Chief

Justice Rehnquist (A-929). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the Fifth Amendment to the Constitution, 28 U.S.C. § 2255, and 18 U.S.C. § 794(c), which are set out verbatim in App. C, 71a-73a.

## STATEMENT OF THE CASE

This case presents important and recurring questions that have divided the federal courts of appeals regarding the availability of judicial relief from punishments that result from broken government promises. These questions arise in the context of a plea bargain induced in substantial part by the exercise of governmental leverage over petitioner's weakened and vulnerable dependent.

### A. Statement of Facts

The facts pertinent to the issues presented in this petition are undisputed. Petitioner was arrested on November 21, 1985 and charged with disclosure of classified United States intelligence information to the Israeli government. Petitioner's wife, Anne Pollard, was arrested the next day, charged as an accessory and jailed without bail. During her incarceration she was stricken by a sustained and acute debilitating gastrointestinal disorder that caused excruciating pain and a weight loss of approximately forty pounds. App. A, 4a.

Negotiations between the government and Mr. Pollard ultimately yielded a plea bargain proposed by the government. App. D, 74a-81a. The proposal relieved

the government of the risks and potential consequences of a public trial of espionage charges involving a vital ally, and secured Mr. Pollard's cooperation in the government's investigation. Mr. Pollard acquiesced in the government's proposal "both to minimize his chances of receiving a life sentence and to enable" Mrs. Pollard to secure relief in the form of an otherwise unattainable plea agreement. App. A, 4a. On May 29, 1986, Mr. Pollard executed the agreement formulated by the government and agreed to plead guilty to one count of conspiracy to violate 28 U.S.C. § 794(c) for delivering classified information to a foreign government. App. D, 74a.[1]

In addition to offering a plea agreement by Mrs. Pollard, the government made three specific promises that were material inducements to Mr. Pollard's agreement to the government's terms. First, it agreed to represent that Mr. Pollard's cooperation and "the information [he] . . . provided [was] . . . *of considerable value to the government's* damage assessment analysis, its investigation of [Mr. Pollard's] case, and the *enforcement of the espionage laws.*" App. D, 77a (emphasis added). Second, it agreed to confine its sentencing allocution to statements "*concerning* the facts and circumstances of the offenses committed by Mr. Pollard." App. D, 77a (emphasis added).[2] Third,

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[1] Mr. Pollard was not charged with and did not plead guilty to providing information to a foreign nation with intent to injure the United States in violation of 18 U.S.C. § 794(a). No charge was *ever* made that Mr. Pollard committed treason, 18 U.S.C. § 2381, which consists of making war against the United States or aiding its enemies, and Mr. Pollard, of course, did not plead guilty to that crime.

[2] The government disputes the interpretation of the words of

while reserving the right to seek a "substantial period of incarceration," App. D, 77a, the government agreed not to seek a life sentence. App. A, 16a.

Mr. Pollard was sentenced nine months later, in March of 1987, after assisting with the government's prolonged investigation, and submitting to repeated polygraphs and innumerable debriefings by law enforcement agencies and representatives of the intelligence community. *See* App. F, 88a.

The government's pre-sentencing allocution characterized Mr. Pollard's cooperation in a segment of its submission entitled "FACTORS COMPELLING SUBSTANTIAL SENTENCE." App. F, 87a. Although it acknowledged that defendant had been "candid and informative," App. F, 88a, and described at length his pre-arrest conduct, it described Mr. Pollard's cooperation as belated, without remorse, and counterproductive to its law enforcement efforts, particularly because it had been provided after Mr. Pollard's Israeli contacts had left the country, App. F, 88a-89a, a fact the government knew several months before tendering a plea agreement to Mr. Pollard containing a promise to represent that his cooperation had been of "considerable value" to the enforcement of the espionage laws. The government belittled Mr. Pollard's motives in offering cooperation and con-

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its agreement, but not the fact of its promise. The language it used to limit its allocution to "facts and circumstances" was in contrast with its retained "full right of allocution in connection with any Rule 35 motion" by Mr. Pollard, App. D, 78a, and, with respect to Mrs. Pollard, its "full right of allocution at all times, *including* the right to detail the facts and circumstances of the offenses committed by Mrs. Pollard . . . ." App. E, 82a (emphasis added).

cluded this segment of its allocution by arguing that his "post-plea cooperation must be viewed" in the context of "*only* factors which *aggravate* the severity of the offense." App. F, 95a (emphasis added).

The government determined that the "facts and circumstances" provision of the plea agreement was "not intended to limit the government's allocution." App. A, 25a. Thus, its allocution was unrestrained. Nearly forty percent of its written submission consisted of argumentation and opinion regarding Mr. Pollard's motives, personality and character. *See* App. F, 87a-96a. The government described him as vengeful, venal, addicted to a high life style, lacking in honor, contemptuous of the United States military and intelligence communities, deceitful, unworthy of trust, disloyal, greedy, arrogant, lacking in remorse, and as someone whose commitment to Israel transcended his loyalty to the United States. *See* App. F, 87a, 90a, 92a; App. H, 100a; App. J, 105a-09a. At the hearing the prosecutor repeated and elaborated on these same themes. He used the phrase, "arrogance and deception," seven times, App. J, 105a-09a, as well as pejorative expressions such as "haughty eyes and lying tongue," "Israel, right or wrong," App. J, 105a, "savaged his fellow inmates," App. J, 106a, "complete lack of honor," and "a very dangerous man." App. J, 109a.

The government responded to its third promise by not asking, "in so many words, for a life sentence." App. A, 20a. However, in addition to its aggressive descriptions of Mr. Pollard's behavior, conduct, personality, loyalty and character, and its denigration of the value of his cooperation, it submitted two declarations from the Secretary of Defense, Caspar

Weinberger, stating that it was not possible to "conceive of greater harm to national security," App. H, 99a; that Mr. Pollard's punishment "should reflect the *perfidy* [and] magnitude of the *treason* committed," App. H, 100a (emphasis added); and that "*no crime is more deserving of severe punishment.*" App. G, 98a (emphasis added). The prosecutor underscored the Secretary's assertion that Mr. Pollard had committed treason by characterizing Mr. Pollard as "traitorous." App. I, 103a. This term inevitably reinforced the Secretary of Defense's calculated invocation of a crime defined in the Constitution, and punishable under the laws of the United States by death. The government thus unmistakably conveyed the sentiment that it expected a sentence commensurate with the crime of treason.

The District Court sentenced Mr. Pollard to life in prison, the maximum sentence permitted under 18 U.S.C. § 794(c), and thereafter denied his motion under Federal Rule of Criminal Procedure 35 for a reduction in sentence.

Mr. Pollard did not appeal his sentence. However, on March 12, 1990, he filed a motion pursuant to 28 U.S.C. § 2255, contending that the government reneged on each important promise that it had exchanged for his guilty plea and that the linking of his and Mrs. Pollard's pleas violated the Constitution. On September 11, 1990, the District Court issued its decision rejecting Mr. Pollard's claims and refusing to order resentencing or to permit him to withdraw his guilty plea. App. B, 58a-68a.

**B. Decision of the Court Below**

On March 20, 1992, a divided panel of the Court of Appeals affirmed the District Court's decision de-

nying Mr. Pollard's § 2255 motion.[3] Acknowledging that this Court had "specifically reserved judgment on 'the constitutional implications of a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused.' " App. A, 13a (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 n.8 (1978) (emphasis in *Bordenkircher*)), the Court of Appeals held that such "plea wiring does not violate the Constitution." App. A, 13a.

Turning next to the District Court's determination that the government had not violated its plea agreement with Mr. Pollard, the Court of Appeals acknowledged that "the standard of appellate review of such a determination . . . is unsettled." App. A, 16a. It recognized that "[s]everal circuits review district court determinations of whether or not a plea agreement has been breached *de novo*," App. A, 16a (citing *United States v. Jimenez*, 928 F.2d 356, 363 (10th Cir.), *cert. denied*, 112 S. Ct. 164 (1991); *United States v. Moscahlaidis*, 868 F.2d 1357, 1360 (3d Cir. 1989)), while "[s]everal others will set aside a district court's finding concerning breach of a plea agreement only if clearly erroneous." App. A, 16a (citing *United States v. Conner*, 930 F.2d 1073, 1076-77 (4th Cir.), *cert.*

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[3] The Court of Appeals rejected the government's "cause and prejudice" argument that Mr. Pollard had waived his claims for § 2255 relief on the ground that the government had failed to advance a focused waiver argument in the court below. *See* App. A, 11a. The dissenting judge agreed, noting that "the government at no point below asserted the cause and prejudice standard," App. A, 36a, and that a "party demanding strict adherence to principles of finality is in a weak position to ask that its own lapses be disregarded, and accordingly the circuit courts have treated government silence as a waiver [of the cause and prejudice argument]." App. A, 37a.

*denied*, 112 S. Ct. 420 (1991); *Raulerson v. United States*, 901 F.2d 1009, 1012 (11th Cir. 1990); *United States v. Ataya*, 864 F.2d 1324, 1327 (7th Cir. 1988)). The Court of Appeals agreed with the latter cases and reviewed the District Court finding "only for clear error," App. A, 18a, observing that it is appropriate to "accord[] a large measure of respect to the district court's judgment in deciding whether a violation occurred in the first place." App. A, 18a.

Applying and repeatedly emphasizing that it was applying a deferential standard of review, the Court of Appeals upheld the District Court's findings that the government did not breach its promises to represent that Mr. Pollard's cooperation had been valuable and to refrain from seeking a life sentence. App. A, 19a-25a. The court also did not disturb the District Court's conclusion that the government had not broken its promise of a limited allocution, although it noted the "more troublesome" nature of this claim, App. A, 25a, and expressed skepticism concerning the government's argument that the "facts and circumstances" language was not intended to limit its right of allocution. App. A, 25a-26a. But the court found it unnecessary to decide whether a breach of the "facts and circumstances" limitation had occurred "because there is a higher and decisive barrier against which this claim of breach of the plea agreement collides." App. A, 27a.

According to the court below, "not all breaches of plea agreements can be said to result in complete miscarriages of justice; not all call for relief under [28 U.S.C.] § 2255." App. A, 28a (citing *United States v. Griffin*, 816 F.2d 1, 7 (D.C. Cir. 1987)). In its view, "[o]nly where there has been a *clear* violation of a

*definite* promise that was a *significant* inducement to the plea can a § 2255 court permit a prisoner to withdraw his plea." App. A, 28a (emphasis added) (citing *Machibroda v. United States*, 368 U.S. 487, 493 (1962)). Applying this manifestly unattainable standard, the Court of Appeals concluded that Mr. Pollard's motion should be denied even if the government's allocution "crossed the limits of the plea agreement." App. A, 27a.

In dissent, Judge Williams found that the government had breached its agreement with Mr. Pollard and that its breach was a "fundamental defect" resulting in a "complete miscarriage of justice." App. A, 49a-50a. He rejected the § 2255 barrier imposed by the majority to plea bargain challenges, App. A, 47a-50a, as "apply[ing] a principle that the government should be held only to the letter of its bond." App. A, 39a. Noting that no party can "anticipate every evasive move that another party may make, or every opportunity for evasion," Judge Williams observed that most courts reject "[b]rittle interpretation" and "literalism and read plea agreements as a reasonable person would understand them." App. A, 39a.

Judge Williams concluded that the District Court had clearly erred when it found no breach of the plea agreement. The "government complied in spirit with none" of its three promises, and "complied in neither letter nor spirit" with its promise to limit its allocution to "the facts and circumstances" of the offenses committed. App. A, 41a.

Regarding the government's promise to represent to the sentencing judge the "considerable value" of Mr. Pollard's cooperation, Judge Williams determined

that "by placing the discussion square in the middle of its reasons why the sentence should be substantial, and by its heavy stress on the cooperation's imperfections, [the government] succeeded in conveying the impression that, *overall*, the value was not 'considerable' but slight." App. A, 42a (emphasis in original).

And as for "the promise not to ask for a life sentence," Judge Williams found that "the government coupled its adherence to the letter with an even more flagrant violation of the agreement's spirit," App. A, 43a, by "calling for a life sentence in all but name." App. A, 44a. "While [Secretary Weinberger's] . . . remarks did not expressly endorse a life sentence . . . , the repeated use of superlatives implied an appeal for the maximum," and "Weinberger's reference to treason took the point further." App. A, 43a. "[T]reason carries the death penalty, 18 U.S.C. § 2381, and involves aiding the nation's *enemies* . . . . [T]he government's barrage expressed a viewpoint that the government had promised not to express." App. A, 43a (emphasis in original). It created a "subtext . . . that the heaviest possible sentence was the lightest that was just." App. A, 44a.

Finally, according to Judge Williams, the government had clearly broken its promise to limit its allocution to the "facts and circumstances" of Mr. Pollard's offenses because it "wrap[ped] the raw facts in an inflammatory rhetoric, endlessly alluding to its (necessarily subjective) opinions that Pollard was greedy and immoral, depicting his conduct as the apogee of espionage, naming him a traitor, and delivering a tirade on his 'arrogance and deceit.' " App. A, 46a.

> Taken together, the government's three promises worked a substantial restraint on the government's allocution. Its commitments to restrict itself to facts and circumstances, and to assess Pollard's cooperation as having significant value, closed off a means by which it might demand a life sentence in all but name. Safely after the fact, the government's briefing here undermines its commitment, isolating the components of the promise in order to conceal their synergies.
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>
> Pollard's sentence should be vacated and the case remanded for resentencing.

App. A, 46a, 50a.

## REASONS FOR GRANTING THE WRIT

### A. There Is A Conflict Among The Circuits Regarding The Standard Of Appellate Review Of District Court Determinations Of Breach Of Plea Agreement Claims.

A sharp conflict exists among the circuits regarding the question whether a district court determination of a claim that a plea agreement has been breached is subject to *de novo* review or to the "clearly erroneous" standard. The court below explicitly acknowledged the conflict, App. A, 16a-17a, and chose to apply the clearly erroneous standard. That standard has been applied to breach of plea agreement claims by the Fourth, Seventh, and Eleventh Circuits. *See, e.g., United States v. Conner*, 930 F.2d 1073, 1076 (4th Cir.) (whether the government breached the agreement is a "question of fact . . . subject to review

under a 'clearly erroneous' standard"), *cert. denied*, 112 S. Ct. 420 (1991); *United States v. Ataya*, 864 F.2d 1324, 1337 (7th Cir. 1988) (district court's determination that defendant had not breached plea agreement subject to " 'clearly erroneous' " review); *Raulerson v. United States*, 901 F.2d 1009, 1012 (11th Cir. 1990) ("[t]he district court's findings on the scope of the agreement and whether the government breached its promise will only be set aside if they are clearly erroneous").

On the other hand, the First, Third, Ninth and Tenth Circuits have squarely held that the question whether a plea agreement was breached is subject to *de novo* review on appeal. *See, e.g., United States v. Atwood*, No. 91-2276, 1992 WL 92137, at *2 (1st Cir. May 6, 1992) ("The court of appeals affords *de novo* review to the question of whether the prosecution violated the terms of a written plea agreement . . . ."); *United States v. Canada*, 960 F.2d 263, 269 (1st Cir. 1992) ("Whether the government breached its plea agreement with Canada is a question of law and our review is plenary."); *United States v. Moscahlaidis*, 868 F.2d 1357, 1360 (3d Cir. 1989) ("[w]hether the government's conduct violates the terms of the plea agreement is a question of law and our review is plenary"); *United States v. Hayes*, 946 F.2d 230, 233 (3d Cir. 1991) (same); *United States v. Badaracco*, 954 F.2d, 928, 939 (3d Cir. 1992) (same); *United States v. Fisch*, 863 F.2d 690 (9th Cir. 1988) ("[w]e review *de novo* Fisch's claim that the government breached the plea agreement at sentencing"); *United States v. Bacal*, No. 90-50479, 1991 U.S. App. LEXIS 20794, at *2 (9th Cir. Aug. 30, 1991) ("[w]hether the prosecutor breached the plea agreement is an issue of law

which we review *de novo*"); *United States v. Jimenez*, 928 F.2d 356, 363 (10th Cir.) ("[w]hether government conduct violates a plea agreement is a question of law subject to *de novo* review"), *cert. denied*, 112 S. Ct. 164 (1991); *United States v. Dash*, No. 90-1251, 1991 U.S. App. LEXIS 30056, at *2 (10th Cir. Dec. 12, 1991) ("[t]his Court will review defendant's claim that the plea agreement was violated *de novo*").

In addition to the disagreement among the circuits as to which standard of review to apply, there are widely varying views regarding the scope and meaning of both the *de novo* and clearly erroneous standards, as this case so clearly illustrates. Judge Williams commented that "the decisions on deference appear replete with contradictions and inconsistency." App. A, 38a.

In applying the clearly erroneous standard here, the court made clear that it was deferring "not to [the District Court's] construction of the terms of the [plea] agreement but to [the District Court's] assessment of whether the government's conduct violated those terms. The meaning of a plea agreement—at least its facial meaning—is of course reviewed *de novo*." App. A, 17a. But the Ninth Circuit takes precisely the opposite approach, deferring to the district court's findings regarding "[w]hat the parties agreed to in the plea bargain agreement," *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980) ("What the parties agreed to in the plea bargain agreement is a question of fact . . . [and] this court's review of the findings made by the court below are subject to the clearly erroneous standard."), while scrutinizing *de novo* the district court's ultimate determination as to whether the government breached the agreement's terms.

*United States v. Fisch*, 863 F.2d at 690 (reviewing *de novo* defendant's claim that government breached plea agreement).

The Sixth Circuit's analysis falls somewhere in between. That court, in *United States v. Barrett*, 890 F.2d 855, 863 (6th Cir. 1989), declared that the scope of its review was "limited" and that "the district court's findings as to the terms of a plea agreement are reviewed only for clear error." However, in *Cody v. Jabe*, 932 F.2d 967 (6th Cir. 1991) (text in WESTLAW), the Sixth Circuit "undert[ook] an independent review of whether the [defendant's conduct] constituted "a 'substantial breach' of the plea agreement." *Id.* at *2-*3 (citations omitted).

This Court "has previously noted the vexing nature of the distinction between questions of fact and questions of law" for purposes of discerning the proper standard of appellate review of district court decisions. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (citing *Baumgartner v. United States*, 322 U.S. 665, 671 (1944)); *see also Miller v. Fenton*, 474 U.S. 104, 113 (1985) ("the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive"); *cf. Wright v. West*, No. 91-542 (U.S. June 19, 1992). That difficult distinction is what appears to be perplexing the courts of appeals in breach of plea agreement cases. Some courts view the breach of plea agreement inquiry as a "question of fact," subject to clearly erroneous review. *Conner*, 930 F.2d at 1076. Others treat it as a "question of law" subject to plenary review on appeal. *Canada*, 960 F.2d at 269; *Moscahlaidis*, 862 F.2d at 1360; *Jimenez*, 928 F.2d at 363. And in this case the court below rejected both of those characterizations,

concluding that petitioner's *breach of plea agreement* claim "presents a mixed question of law and fact . . . ." App. A, 17a.

This case presents a particularly anomalous application of an unclear standard in a context that is plainly inappropriate. There were no questions of *fact* presented by this case. What the government actually said and did during its allocution are undisputed.[4] The plea agreement itself was reduced to writing and no extrinsic evidence was introduced to aid the District Court's interpretation of the agreement. And "the meaning of the agreement [was] not in dispute; at least with respect to the first two of Pollard's claims of breach [relating to the cooperation and life sentence promises], the question [was] *only* whether the government's arguments transgressed the agreed norm." App. A, 19a (emphasis added). Although the government disputed petitioner's assertion that the "facts and circumstances" clause of the plea agreement limited the government's allocution, contending that the provision intended *no* limitation on the government's allocution, App. A, 25a, the Court of Appeals not only expressed serious doubts about the government's position, *id.*, but also correctly held that

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[4] Certain of Secretary Weinberger's statements and other government sentencing arguments were contained in a non-classified portion of the government's allocution. The Court of Appeals affirmed the District Court's refusal to accord access to classified sentencing materials to petitioner's counsel on the ground that, if that decision was erroneous, it was "harmless." App. A, 34a n.15. It is impossible for counsel to evaluate that conclusion or properly to represent Mr. Pollard absent access to *all* of the government's arguments regarding his sentence.

such *interpretative* questions are subject to *de novo* review. App. A, 17a.[5]

Accordingly, petitioner's breach of plea agreement claims here presented purely legal questions to the Court of Appeals that required it simply to measure the government's conduct against the express terms of the agreement. Even if petitioner's claims are viewed as presenting mixed "questions of law and fact," as the court below erroneously concluded, such questions are ordinarily subject to *de novo* review. *See Wright v. West*, No. 91-542, slip op. at 4-7, 9 (U.S. June 19, 1992) (O'Connor, J., concurring in the judgment); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1983) (the clearly erroneous standard does not apply to "inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact"); *Carter v. Bennett*, 840 F.2d 63, 64-65 (D.C. Cir. 1988); *see also* 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2589 (1971 & Supp. 1992) ("Whether these be referred to as mixed questions of law and fact, or legal inference from the facts, or the application of law to the facts, there is substantial

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[5] The Court of Appeals, applying the *de novo* standard of review, erroneously upheld the District Court's interpretation of the government's promise to represent that Mr. Pollard's cooperation was "of considerable value" to the "enforcement of the espionage laws." The District Court inexplicably interpreted this clause to allow the government to argue that Mr. Pollard's cooperation had "*frustrated* [the] Government['s] [law enforcement] efforts." App. B, 64a (emphasis added). The majority explicitly endorsed that construction, even though it squarely contradicts the express language of the plea agreement. App. A, 23a n.8.

authority that they are not protected by the clearly erroneous rule and are freely reviewable.").

The Court of Appeals rationalized its choice of a standard of review by relying on a premise that has been squarely rejected by this Court. The court below held that a district court's conclusions are entitled to special deference where a defendant claims that the government's allocution breached the plea agreement. Because such claims also implicitly assert that "the district judge was swayed by the breach," the court reasoned, "the district judge inevitably examines the claim in light of his own recollection of how the government's arguments struck him at the time they were presented." App. A, 17a. Thus, the question "whether an illegal implicit appeal was made . . . is one concerning which we must afford deference to the district court." App. A, 18a. But that reasoning cannot be reconciled with *Santobello v. New York*, 404 U.S. 257 (1971), which held that the effect on the judge of the government's breach is irrelevant to the inquiry. *Id.* at 262-63; *see Canada*, 960 F.2d at 271 (under *Santobello*, "[w]hether or not the sentencing judge was actually influenced by the Assistant United States Attorney's actions is not a material consideration"). "Where a defendant claims that the government's allocution breached a plea agreement, there is no deference to the sentencing judge's view of the actual *effect* of the allocution on him or her . . . ." App. A, 38a. (Williams, J., dissenting) (emphasis in original); *see* App. A, 38a-39a (discussing *Santobello*).

The Court should grant the petition and articulate clearly the proper standard of appellate review in cases involving claims that the government violated its plea bargain. This Court regularly grants review

to resolve standard of review questions, *see, e.g.*, *Wright v. West*, No. 91-542 (U.S. June 19, 1992); *Thornburgh v. Abbott*, 490 U.S. 401 (1988); *Pullman-Standard*, 456 U.S. at 273, particularly where the circuits are divided, *see, e.g.*, *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1988); *Miller v. Fenton*, 474 U.S. at 109. Such questions necessarily have a broad impact on the administration of criminal justice in the federal courts. Moreover, the vast majority of federal criminal cases are resolved through plea bargaining. *See* U.S. Dep't. of Justice, *Sourcebook of Criminal Justice Statistics* 502 tbl. 5.25 (Kathleen Maguire & Timothy J. Flanagan eds., 1990) (86% of federal criminal cases in 1989 were disposed of without a trial); *see also* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909 (1992). As a result, the courts of appeals "in recent years . . . [have] been repeatedly confronted with difficult questions concerning the interpretation and enforcement of plea bargains." *Ataya*, 864 F.2d at 1329; *see also Atwood*, 1992 WL 92137,.at *1 ("We have regularly exercised appellate jurisdiction to oversee claims [that the government breached a material term of a binding plea agreement].").

**B. There Is A Conflict Among The Circuits Regarding The Standard Governing Relief From Broken Plea Bargains Under 28 U.S.C. § 2255.**

The standard for relief under 28 U.S.C. § 2255 where the government has violated the terms of a plea bargain is "elusive," App. A, 48a (Williams, J., dissenting), and clearly unsettled. The manner in which this question was resolved by the court below

is inconsistent with the value that this Court has placed on the fulfillment of governmental plea bargain promises and the approaches taken by other circuits.

In *Santobello v. New York*, 404 U.S. 257 (1971), this Court held that while the level of safeguards available to a defendant pleading guilty may vary, "a constant factor is that when a plea rests in *any* significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise *must* be fulfilled." *Id.* at 262 (emphasis added). The Court has never suggested that this "constant factor" disappears when the government's breach is challenged in a § 2255 proceeding. While the lower courts have grappled with the question whether the government is held to a lesser standard in a § 2255 proceeding, no consensus has emerged. *See, e.g., United States v. Cates*, 952 F.2d 149, 151 (5th Cir.) (additional briefing requested on whether and how the § 2255 remedy affects allegations of a broken plea agreement), *cert. denied*, 112 S. Ct. 2319 (1992).

The court below determined that while "*any* breach of a promise that induced the guilty plea *ordinarily* entitles the defendant on direct review either to specific performance and resentencing before a different judge or to withdrawal of the guilty plea," App. A, 28a (emphasis added), a much higher standard was required in § 2255 cases. It thus erected "a higher and decisive barrier" to reject Mr. Pollard's claim: "[o]nly where there has been a *clear* violation of a *definite* promise that was a *significant* inducement to the plea can a § 2255 court permit a prisoner to withdraw his plea." App. A, 28a (emphasis added). This innovative triple barricade meant that even if the gov-

ernment's conduct toward Mr. Pollard "might well justify relief on direct appeal of [his] sentence," App. A, 31a, there was "simply no way that Pollard's sentence, harsh as it is," App. A, 29a, and the government's "hard-nosed dealings," App. A, 31a, would meet the standard. In fact, the D.C. Circuit's three-tier barrier would take § 2255 out of the reach of most victims of governmental plea bargain deception.

The only authority cited by the court below for its restatement of *Santobello* to make it essentially inapplicable in § 2255 proceedings was another D.C. Circuit opinion, *United States v. Griffin*, 816 F.2d 1, 7 (D.C. Cir. 1987). That case is particularly revealing because it was decided contemporaneously with Mr. Pollard's sentencing. Like the *Pollard* case, it involved a defendant's claim for § 2255 relief arising from the prosecutor's violation of a plea bargain provision limiting the government's allocution. The prosecutor in *Griffin* assaulted the defendant's character despite an agreement not to do so, exactly what was done, to an even greater extent, to Mr. Pollard. The striking similarity of the abuse of the plea agreement in that case by the same prosecutor reflects a disturbing pattern, also noted by the court in *Griffin*. While the *Griffin* court found that the government had broken its promise, it denied relief under a "manifest injustice" standard. It nevertheless felt compelled to state:

> [w]e have previously had occasion, however, to "admonish the government to avoid occasions for questioning its meticulous adherence to the terms of a plea bargain," and we do so again in this case.

*Griffin*, 816 F.2d at 7. *Pollard*, *Griffin* and the previous incidents cited in *Griffin* illustrate the inevitable result of relieving prosecutors of the consequences of breaching the commitments they make in exchange for guilty pleas.

Aside from *Griffin* and the decision below, no other case has held or even hinted that the *Santobello* rule has less force in the § 2255 context. In fact, other circuits have explicitly relied upon *Santobello* to grant § 2255 relief for plea agreement violations. *See, e.g.*, *Brunelle v. United States*, 864 F.2d 64, 64-65 (8th Cir. 1988); *United States v. Carbone*, 739 F.2d 45, 46 (2d Cir. 1984); *United States v. Mercer*, 691 F.2d 343, 346 (7th Cir. 1982); *Correale v. United States*, 479 F.2d 944, 947, 949-50 (1st Cir. 1973).

Even in cases denying § 2255 relief, courts have recognized that *Santobello* requires collateral relief if a plea agreement breach has occurred. *See, e.g., Panzardi-Alvarez v. United States*, 879 F.2d 975, 986 (1st Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990); *United States v. Quan*, 789 F.2d 711, 713 (9th Cir. 1986); *United States v. Clark*, 781 F.2d 730, 731 (9th Cir. 1986). Thus, except for *Griffin* and the decision below, courts denying § 2255 relief have done so not because *certain* plea agreement breaches may not be remedied in § 2255 proceedings, but rather simply because the movant failed to show *any* breach of the plea agreement. *See, e.g., Panzardi-Alvarez*, 879 F.2d at 987; *Quan*, 789 F.2d at 714; *Clark*, 781 F.2d at 730, 732.

Contrary to the court below, other circuits have determined that § 2255 relief is available for the government's breach of promises that form a part of the inducement or consideration for a guilty plea. *See,*

*e.g.*, *Cates*, 952 F.2d at 151 ("It is well settled that a guilty plea based on a breached plea agreement is subject to collateral attack . . . ."); *Panzari-Alvarez*, 879 F.2d at 986 ("The government may not breach *any* term of a plea agreement which induced the defendant to plead guilty.") (emphasis added); *Correale*, 479 F.2d at 947 ("Though a legitimate prosecution promise does not render a guilty plea legally involuntary, . . . its fulfillment is a necessary predicate to a conclusion of voluntariness when a plea 'rests in *any* significant degree' on it.") (emphasis added); *Mercer*, 691 F.2d at 347 (observing that the government's breach of a plea agreement is "of constitutional magnitude, since the waiver of the defendant's constitutional rights was based on a promise that was unkept"); *Knight v. United States*, 611 F.2d 918, 921 (1st Cir. 1979) ("A guilty plea becomes involuntary, and the ensuing sentence subject to collateral attack, when the prosecutor fails to perform his side of a plea agreement.").

In cases construing 28 U.S.C. § 2254, the habeas statute for state prisoners, this Court and the courts of appeals have also recognized that "when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." *Mabry v. Johnson*, 467 U.S. 504, 509 (1984) (citing *Santobello*, 404 U.S. at 262); *see also Smith v. Blackburn*, 785 F.2d 545, 548 (5th Cir. 1986) ("The petitioner need not show . . . that the government's unkept promise was the *sole* inducement for his plea of guilty.") (emphasis added).[6]

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[6] There is even more reason for federal courts to grant col-

The decision below is also in conflict with other circuits concerning basic principles of plea agreement interpretation in the § 2255 context. As Judge Williams observed, the majority "appear[ed] to apply a principle that the government should be held only to the letter of its bond." App. A, 39a. While the majority acknowledged that the "facts and circumstances" clause was ambiguous, App. A, 26a, it nevertheless refused to construe this provision against the government, the party wholly responsible for the language in the agreement. This literalist approach to plea agreement interpretation is in fundamental tension with the traditional view that plea agreements are to be construed according to " 'what the defendant *reasonably* understood [to be the terms of the agreement] when he entered his plea,' without 'resort[ing] to a rigidly literal approach in the construction of language.' " *United States v. Pogue*, 865 F.2d 226, 227 (10th Cir. 1989) (quoting *United States*

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lateral relief for a federal prisoner's claim of a plea agreement breach than there is to grant such relief for a state prisoner. Federalism principles, which may counsel against a federal court's use of § 2254 to interfere with a judgment rendered by a state court, *see Coleman v. Thompson*, 111 S. Ct. 2546, 2552 (1991) ("This is a case about federalism."), obviously have no relevance in the § 2255 context. Moreover, quite apart from constitutional concerns raised by the government's breach of a plea agreement, the federal courts have a special and significant responsibility to promote the integrity of the federal government by strictly enforcing contracts entered into by criminal defendants and the United States. *See United States v. Garcia*, 956 F.2d 41, 43 (4th Cir. 1992) ("with respect to federal prosecutions, the courts' concerns run even wider than protection of the defendant's individual constitutional rights—to concerns for the 'honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government' ").

*v. Greenwood*, 812 F.2d 632, 635 (10th Cir. 1987)); *see, e.g., United States v. Rivera*, 954 F.2d 122, 124 (2d Cir.), *cert. denied*, 112 S. Ct. 1701 (1992); *Quan*, 789 F.2d at 711.

The court below also ignored the principle that ambiguous plea agreement terms are to be construed strictly against the government and in favor of the defendant. *See, e.g., United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990); *United States v. Harvey*, 791 F.2d 294, 301, 303 (4th Cir. 1986). As the Third Circuit recently observed, " '*Santobello* and its progeny proscribe not only explicit repudiation of the government's assurances, but must in the interests of fairness be read to forbid end-runs around them.' " *United States v. Badaracco*, 954 F.2d 928, 941 (3d Cir. 1992) (quoting *United States v. Voccola*, 600 F. Supp. 1534, 1537 (D.R.I. 1985)); *see, e.g., Canada*, 960 F.2d at 269-71 & n.8 (holding that government breached plea agreement even though prosecutor paid " 'lip service' " to promises in plea agreement and "stopped short of explicitly repudiating the agreement," because prosecutor's "overall conduct simply did not amount to compliance in spirit and substance with the government's agreement" and "grudging and apologetic" performance "suggest[ed] an implied repudiation of the government's bargain").

The Court of Appeals attempted to justify its departure from traditional rules of plea agreement construction by relying on the limited scope of review under § 2255. Other courts, however, do not believe that the § 2255 remedy changes these principles. In *United States v. Garcia*, 956 F.2d 41, 44 (4th Cir. 1992), for example, the Fourth Circuit granted § 2255 relief for the breach of an ambiguous plea agreement,

holding that " 'both constitutional and supervisory concerns require holding the Government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements.' " *Id.* (citation omitted). The court observed that it "could not interpret [the agreement] as the government suggests without resolving a serious ambiguity in its favor." *Id.* at 45. "Inasmuch as . . . *the government . . . bear*[*s*] *the burden of this ambiguity*," the defendant was entitled to resentencing. *Id.* (emphasis added).[7]

**C. The Court Should Grant The Petition To Examine And Clarify The Constitutional Implications Of "Wired" Plea Agreements.**

The government has not denied that Anne Pollard had been desperately ill in the District of Columbia jail subsequent to her arrest, experiencing weeks of excruciating pain, debilitating loss of weight and great emotional distress. And the government admits that it conditioned its willingness to plea bargain with Anne Pollard on Jonathan Pollard's plea of guilty. The prosecutor thus acknowledges that it intentionally conditioned its treatment of petitioner's weakened and vulnerable spouse, including the prospect of additional

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[7] *See also Correale*, 479 F.2d at 947 (granting § 2255 relief while noting that "the most meticulous standards of both promise and performance must be met by prosecutors engaging in plea bargaining"); *Mercer*, 691 F.2d at 344 (granting § 2255 relief for breach of an "ambiguously drawn" plea agreement); *Smith v. Blackburn*, 785 F.2d at 548 (granting habeas relief for breach of plea agreement while noting that "[t]he government must 'adhere strictly to the terms and conditions of the plea agreement it negotiates' ").

charges against her, on his acceptance of the prosecutor's terms.

This Court has not yet reached the question whether tactics such as these comport with constitutional requirements. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 n.8 (1978). The lower courts, like the court below here, have uniformly interpreted *Bordenkircher* to mean that the Court has "reserved judgment," App. A, 13a, on the potential "constitutional implications" of wired pleas.[8] Thus far, no cohesive set of constitutional principles has emerged from these decisions.

The Court of Appeals in this case and several other circuits have rejected the argument that wired pleas are so inherently coercive that they, "*per se* . . . offend due process or the privilege against compulsory incrimination." App. A, 13a. The Court of Appeals here went further, however, and also held that, absent prosecutorial bad faith, a wired plea agreement can *never* give rise to a constitutional challenge on grounds of involuntariness and that the government's linkage of a defendant's plea to that of a desperately ill "loved one" is not even a relevant factor to be

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[8] *See, e.g., United States v. Marquez*, 909 F.2d 738, 741 (2d Cir. 1990) ("In *Bordenkircher* . . . the Supreme Court noted but found no need to consider 'the constitutional implications of a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused.' ") (citation omitted; emphasis in original), *cert. denied*, 111 S. Ct. 957 (1991); *United States v. Laura*, 667 F.2d 365, 379 n.11 (3rd Cir. 1981) ("The Supreme Court, in fact, has expressly left open the question of whether such a bargain is constitutionally permissible.") (citing *Bordenkircher*); *United States v. Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979) ("The Supreme Court has expressly reserved judgment on the issue.") (citing *Bordenkircher*).

considered. *See* App. A, 14a. Thus, despite *Bordenkircher*, the court below in effect held that wired pleas do not implicate the Constitution at all and upheld the District Court's decision not even to grant a § 2255 hearing on Mr. Pollard's claim.

However, other courts have acknowledged that "familial coercion" can render a plea involuntary in violation of the Constitution, *see United States v. Cammisano*, 599 F.2d 851, 855 (8th Cir. 1979); *Johnson v. Wilson*, 371 F.2d 911, 912 (9th Cir. 1967), and have concluded that the linkage of a defendant's guilty plea to that of a third party is a factor that must be considered in evaluating the voluntariness of the plea. *United States v. Marquez*, 909 F.2d 738, 742 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991); *see, e.g., United States v. Daniels*, 821 F.2d 76, 80 (1st Cir. 1987). In addition, some lower courts have recognized that wired plea agreements "pose a greater danger of coercion than purely bilateral plea bargaining, and that, accordingly, 'special care must be taken to ascertain the voluntariness of' guilty pleas entered in such circumstances." *United States v. Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979) (quoting *United States v. Tursi*, 576 F.2d 396, 398 (1st Cir. 1978)); *see also United States v. Diaz*, 733 F.2d 371, 375 (5th Cir. 1984); *United States v. Buckley*, 847 F.2d 991, 1000 & n.6 (1st Cir. 1988), *cert. denied*, 488 U.S. 1015 (1989). And still other courts have insisted that where pleas are wired, "prosecutors [must] exercise a *high standard of good faith* in negotiating such pleas." *Harman v. Mohn*, 683 F.2d 834, 838 (4th Cir. 1982) (emphasis added); *see also Moiser v. Murphy*, 790 F.2d 62, 66 (10th Cir.) ("the inclusion of such third persons can increase the leverage possessed by prosecutors

and therefore imposes upon them a high standard of good faith"), *cert. denied*, 479 U.S. 988 (1986).

The numerous decisions addressing constitutional challenges to wired plea agreements are confusing and inconsistent. The Court should grant the petition to examine and clarify this important and recurring question.

## CONCLUSION

For the foregoing reasons, the petition should be granted and this case set for plenary consideration.

July 1, 1992

Respectfully submitted,

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# APPENDIX

# APPENDIX

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APPENDIX A

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued September 10, 1991 Decided March 20, 1992
[As Amended by Order of May 28, 1992]

No. 90-3276

UNITED STATES OF AMERICA

v.

JONATHAN JAY POLLARD,
APPELLANT

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Appeal from the United States District Court
for the District of Columbia

(86cr00207-01)

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*Theodore B. Olson*, with whom *John H. Sturc*, *Theodore J. Boutrous, Jr.*, and *Hamilton P. Fox, III* were on the brief, for appellant.

*John R. Fisher*, Assistant United States Attorney, with whom *Jay B. Stephens*, United States Attorney, and *Elizabeth H. Danello*, Assistant United States Attorney, were on the brief, for appellee.

*Kenneth Lasson* was on the brief for *amici curiae,* Law Professors, et al., urging reversal.

Before: RUTH B. GINSBURG, SILBERMAN, and WILLIAMS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Circuit Judge* WILLIAMS.

SILBERMAN, *Circuit Judge*: Pursuant to an agreement with the government, Jonathan Pollard pleaded guilty on June 4, 1986 to one count of conspiracy to deliver national defense information to a foreign government. *See* 18 U.S.C. § 794(c). Chief Judge Aubrey E. Robinson, Jr. of the district court sentenced him to life imprisonment. Pollard did not appeal his conviction. Pollard later made an unsuccessful motion under FED. R. CRIM. P. 35 to have his sentence reduced and, again, did not appeal.

Three years after sentencing, having served the intervening time in prison, Pollard sought to attack his sentence collaterally by filing a motion under 28 U.S.C. § 2255[1] seeking the district court's approval to withdraw his guilty plea. Pollard claimed that the government obtained his guilty plea improperly—even unconstitutionally—by linking or "wiring" his wife's plea to his own. Anne Henderson Pollard had also been arrested in connection with Pollard's espionage, but the government refused to enter into a plea agreement with her unless he pleaded guilty as well. Pollard also asserted that the government breached the plea agreement by the nature of its argu-

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[1]28 U.S.C. § 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

ments (allocution) to the district court at sentencing and, furthermore, that Chief Judge Robinson based Pollard's sentence on *ex parte* communications from the government. Appellant sought a hearing on this rather dramatic charge and asked Chief Judge Robinson to recuse himself. Pollard's new attorneys in the § 2255 proceeding also sought access to certain highly classified materials the government had submitted at sentencing.

The district judge declined to recuse, denied access to the classified sentencing materials, and, without holding a hearing, refused to permit Pollard to withdraw his guilty plea. *See United States v. Pollard,* 747 F. Supp. 797 (D.D.C. 1990). This appeal followed, and we now affirm.

## I.

For a period of approximately eighteen months, from June 1984 through November 1985, Jonathan Pollard, an Intelligence Research Specialist with the United States Navy, removed large amounts of highly classified U.S. intelligence information from his office, copied it, and delivered it to agents of the Israeli government. Initially, Pollard was not paid, but during the last twelve months of this period, he met regularly with his Israeli handlers in order to receive specific tasking information, and he received between $1,500 and $2,500 per month for his efforts.

Approximately one year after the regular deliveries began, agents of the FBI and Naval Investigative Service (NIS) stopped Pollard as he was leaving work and questioned him concerning the unauthorized removal of classified information from his office. Twice during the interview, Pollard received permission to call home to his wife, Anne Henderson Pollard. In those conversations, he used the prearranged code word "cactus," whereupon Mrs. Pollard removed a suitcase full of classified U.S. intelligence information from the Pollards' apartment and contacted Pollard's Israeli handlers to tell them that Pollard

was in trouble. This was her only active involvement in Pollard's espionage.

During the next two days the FBI and NIS conducted further interviews of Pollard. Pollard, in the course of these interviews, lied to his interrogators, keeping secret his involvement with the Israelis. He stalled for time, as his Israeli handlers had instructed him, and one of his handlers during this period managed to leave the country.

Jonathan Pollard was finally arrested on November 21, 1985, and charged with violations of 18 U.S.C. §§ 794(a) and 793(e). Mrs. Pollard was arrested a day later as an accessory. The Pollards, prior to their arrests, had sought asylum at the Israeli embassy, actually gaining entrance to the embassy compound at one point, but the Israelis turned them away. Nonetheless, during his initial post-arrest interviews, Pollard continued to protect his Israeli handlers. Although he admitted that he had lied in his earlier interviews and had in fact been delivering classified information to a foreign government, he refused to identify the government or the names of the foreign intelligence agents controlling him. Pollard's other Israeli handler departed the United States during this time.

Following their arrests, the Pollards were jailed without bail. Mrs. Pollard had, for several years, suffered from a debilitating gastrointestinal disorder that had not been accurately diagnosed prior to her arrest. During her stay in the D.C. jail, she was seriously ill, losing forty pounds over a period of three months. In February of 1986, Mrs. Pollard was released on bail.

Pollard had, in the meantime, begun plea discussions with the government. He sought to plead guilty both to minimize his chances of receiving a life sentence and to enable Anne Pollard to plead as well, which the government was otherwise unwilling to let her do. The government, however, was prepared to offer Pollard a plea agreement only after Pollard consented to assist the government in its damage assessment and submitted to polygraph examinations and interviews with FBI agents and

Department of Justice attorneys. Accordingly, over a period of several months, Pollard cooperated with the government investigation, and in late May of 1986, the government offered him a plea agreement, which he accepted.

By the terms of that agreement, Pollard was bound to plead guilty to one count of conspiracy to deliver national defense information to a foreign government (18 U.S.C. § 794(c)), which carried a maximum prison term of life, and to cooperate fully with the government's ongoing investigation. He promised not to disseminate any information concerning his crimes without submitting to preclearance by the Director of Naval Intelligence. His agreement further provided that failure by Anne Pollard to adhere to the terms of her agreement entitled the government to void his agreement, and her agreement contained a mirror-image provision.

In return for Pollard's plea, the government promised not to charge him with additional crimes, entered into a plea agreement with Anne Pollard, and made several specific representations that are very much at issue in this case. The critical provisions are paragraphs 4(a) and 4(b) of the agreement, in which the government "agree[d] as follows":

> (a) When [Pollard] appears before the Court for sentencing for the offense to which he has agreed to plead guilty, the Government will bring to the Court's attention the nature, extent and value of his cooperation and testimony. Because of the classified nature of the information Mr. Pollard has provided to the Government, it is understood that particular representations concerning his cooperation may have to be made to the Court *in camera*. In general, however, the Government has agreed to represent that the information Mr. Pollard has provided is of considerable value to the Government's damage assessment analysis, its investigation of this criminal case, and the enforcement of the espionage laws.
>
> (b) Notwithstanding Mr. Pollard's cooperation, at the time of sentencing the Government will recom-

> mend that the Court impose a sentence of a substantial period of incarceration and a monetary fine. The Government retains full right of allocution at all times concerning the facts and circumstances of the offenses committed by Mr. Pollard, and will be free to correct any misstatements of fact at the time of sentencing, including representations of the defendant and his counsel in regard to the nature and extent of Mr. Pollard's cooperation. Moreover, Mr. Pollard understands that, while the Court may take his cooperation into account in determining whether or not to impose a sentence of life imprisonment, this agreement cannot and does not limit the court's discretion to impose the maximum sentence.

The district court accepted Pollard's plea at a hearing held on June 4, 1986. Chief Judge Robinson addressed Pollard in open court and questioned him about his understanding of the rights he was surrendering, including the potential sentences he faced and the terms of the plea agreement. After being assured by both Pollard and his attorney that there was no reason to be chary of the plea, the district court accepted it.

Sentencing took place nine months later. Both the government and Pollard submitted extensive pre-sentencing memoranda to the district judge. In general, the government argued that Pollard had done grievous damage to U.S. national security interests in the pursuit of financial reward and that Pollard was unremorseful and a continuing danger to national security. The government mentioned that Pollard had violated his plea agreement while in prison awaiting sentencing by giving several interviews to a journalist for the *Jerusalem Post,* Wolf Blitzer, without first submitting his comments to the Director of Naval Intelligence. This again, according to the government, demonstrated that Pollard could not be trusted to refrain from disclosing the various national secrets in his possession and that he still considered himself the best judge of when to follow rules that had been imposed upon him. In addition to its principal sentencing memoranda urging the district court to impose a substantial sentence, the gov-

ernment also submitted a highly classified declaration by Secretary of Defense Caspar Weinberger cataloguing the damage Pollard had done and opining that the damage had been "substantial and irrevocable." The day before sentencing took place, Secretary Weinberger submitted an unclassified supplemental declaration in response to Pollard's submissions that stated, in a rather polemical tone, the Secretary's contentions.

In response to the government's submissions, Pollard argued that he had done little damage to national security because the information he had misappropriated had been delivered to one of the United States' closest allies. He denied that he had been motivated by greed, instead claiming that he had sought to aid Israel because he believed that his aid to Israel would also benefit United States' security interests. He stressed the extent and value of his cooperation and the sincerity of his contrition. And he emphasized the special hardships prison life would impose on him and the psychological and emotional deterioration he had experienced during confinement.

After hearing oral allocution, the district judge sentenced Pollard to life in prison and Mrs. Pollard to five years.[2] Pollard did not appeal but made a timely Rule 35 motion seeking to have his sentence reduced on the ground that it was disproportionate to the sentences received by other spies whose espionage was arguably more damaging to United States' interests. He repeated the arguments he had made at sentencing and maintained in particular that the district court had failed to take proper account of his cooperation. The district court denied the motion, and Pollard did not appeal.

Anne Pollard was released on parole after serving three years in prison; she subsequently moved to Israel in August, 1990. Some months earlier, a professor at Harvard Law School, Alan Dershowitz, whose role as Pollard's

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[2]It should be noted that this case arose, and sentence was imposed, prior to the effective date of the United States Sentencing Guidelines.

representative in this case is not entirely clear, had asked retired Supreme Court Justice Arthur Goldberg to investigate the reasons for Pollard's life sentence. Mr. Goldberg, according to Professor Dershowitz's affidavit, discussed the matter with Chief Judge Robinson. The Chief Judge purportedly told Mr. Goldberg that Pollard had provided Israel with information demonstrating American knowledge of certain details of Israeli-South African defense cooperation and that this had "weighed heavily" in the sentence. Dershowitz claims that Pollard never provided the Israelis that sort of information, so he asserts in his affidavit that Mr. Goldberg inferred that the government may have made improper *ex parte* submissions to Chief Judge Robinson.[3]

The present litigation began in March 1990, when Pollard filed the motion under 28 U.S.C. § 2255 to withdraw his guilty plea. Pollard sought a hearing on the allegations contained in the Dershowitz affidavit, as well as on Pollard's claims that the government coerced his plea and breached the subsequent plea agreement. He moved to disqualify Chief Judge Robinson pursuant to 28 U.S.C. § 455 on the grounds that Chief Judge Robinson's impartiality might reasonably be questioned and that the judge possessed personal knowledge of disputed evidentiary facts and might therefore be a material witness at the hearing. Pollard's new counsel also sought access to the highly classified materials originally submitted by the government at sentencing, including the Weinberger declaration, in order to aid in the preparation of the § 2255 motion.

The district court rejected all of Pollard's claims without a hearing, finding that his contentions could be resolved adequately on the files and records of the case and on the court's judicial knowledge and recollection. *See*

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[3]Mr. Goldberg was unable to prepare his own affidavit or to testify to the matters Professor Dershowitz described, because he died on January 18, 1990, a few days after he received a letter from Dershowitz in which Dershowitz informed him of the results of the inquiries Dershowitz had made.

*Pollard*, 747 F. Supp. at 801. It found that the government had complied in all relevant respects with the terms of the plea agreement and that Pollard's plea had been knowing and voluntary. *See id.* at 802-06. It denied Pollard's counsel access to the classified sentencing materials for the same reasons that other courts have sometimes refused to permit access to presentence reports: the district court found that the merits of Pollard's substantive claims "simply do not withstand scrutiny" and that Pollard's new counsel could, in any event, learn the information from Pollard and his former counsel. *Id.* at 807. The district judge refused to recuse himself, stating flatly that the allegations of *ex parte* contacts were untrue and that the district court's personal knowledge of the disputed evidentiary facts was gained in a judicial capacity and so provided no basis for disqualification. *See id.* at 799-801.

## II.

We are met at the outset with the government's argument that some of Pollard's claims, particularly that the government violated the plea agreement by the nature of its arguments to Chief Judge Robinson, are not properly before us in a § 2255 proceeding because they were not raised at sentencing, or in the subsequent Rule 35 motion, and because Pollard did not take a direct appeal. The government's contention is, in essence, that those claims were waived. We think, however, that Pollard's argument that he was unconstitutionally coerced into a plea agreement because his wife's plea was wired with his is properly brought in the first instance in a § 2255 motion since, accepting Pollard's allegations as true, he would have been deterred from raising that argument until his wife was out of harm's way. If he had been induced to plead guilty because of the government's posture vis-a-vis his wife, he could not be expected to openly challenge that very arrangement as unlawful while his wife was still vulnerable. If he had prevailed—and the plea agreement was nullified—he would be back in the same position he was in when he was "forced" to enter into the plea in the first

place. Similarly, the claim that Chief Judge Robinson considered information brought to him *ex parte* by the government, based as it is on newly discovered "evidence," could not have been raised before.

Pollard's claims of breach of the plea agreement stand on somewhat different footing. We cannot as easily excuse his failure to raise all of those arguments. At the time of sentencing, such claims would require specific performance of the agreement, not its nullification, so his wife's alleged vulnerability if the plea were withdrawn is not relevant. Pollard did in fact raise one of his breach arguments at sentencing and again in a Rule 35 motion (although he appeared to abandon it at sentencing), perhaps illustrating the point.

We note that the law is rather unclear as to what claims can be raised in a § 2255 motion that were not raised at sentencing, in a Rule 35 motion, or in a direct appeal from sentencing. *See, e.g., Theodorou v. United States,* 887 F.2d 1336, 1338-40 (7th Cir. 1989); *Williams v. United States,* 805 F.2d 1301, 1303-06 (7th Cir. 1986), *cert. denied,* 481 U.S. 1039 (1987); *United States v. Baylin,* 696 F.2d 1030 (3d Cir. 1982); *United States v. Corsentino,* 685 F.2d 48, 50-51 (2d Cir. 1982). To complicate the matter even further, the government was quite imprecise in the proceeding below regarding its waiver arguments. It may well be that the government thus waived its waiver claim. *See United States v. Hall,* 843 F.2d 408, 410 (10th Cir. 1988). The government, to be sure, repeatedly complained that Pollard's § 2255 motion had been filed three years after he was sentenced and long after the basis for his claims should have become apparent to him, and that Pollard's counsel had not protested the alleged breaches of the plea agreement at the sentencing hearing. But the government explicitly used the term "waiver" only with respect to Pollard's claim that the government failed adequately to describe the nature of Pollard's cooperation.

Ordinarily, we would feel obliged to decide whether Pollard had waived the breach of the plea agreement argu-

ments that he presents here (although we do not see the issue as jurisdictional), but because the government was so unfocused in its argument on this issue before the district court, and because we reject Pollard's claims on the merits, we do not think it necessary to resolve the difficult question of Pollard's right to bring all of his claims in a § 2255 proceeding.[4] We do, however, give due consideration to Pollard's (and his counsel's) reactions upon hearing the government's allocution at sentencing in determining whether the government's allocution breached the agreement.

We are also mindful that in a § 2255 collateral challenge, an appellant, in order to gain relief under *any* claim, is obliged to show a good deal more than would be sufficient on a direct appeal from his sentence. Section 2255 is not a substitute for a direct appeal. *See United States v. Frady,* 456 U.S. 152, 165 (1982). As both parties agree, we are authorized to grant relief only if we determine that the challenged sentence resulted from " 'a fundamental defect which inherently results in a complete miscarriage of justice,' or 'an omission inconsistent with the rudimentary demands of fair procedure.' " FED. R. CRIM. P. 32, Advisory Committee's Note on 1983 Amend-

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[4]Our dissenting colleague sidesteps the knotty problems involved in finding cause and prejudice sufficient to excuse Pollard's failure to object at sentencing, because he contends the government "waived the defense" below. Dissent at 1. Judge Williams may be correct that the government merely "grazed the issue," *id.*, as to some of Pollard's claims, but the government addressed it directly as to Pollard's claim that the government failed to describe adequately his cooperation. No mere "vague footnote throwaway line," *id.*, the government's statement concerning this claim of Pollard's said:

> "We doubt that the defendant has preserved this point for review. As he raised it explicitly during the sentencing hearing, and then abandoned it, we believe he has waived the right to argue it on collateral attack under § 2255. Nonetheless, we respond to these claims on the merits."

Opposition to Defendant's Motion to Withdraw His Guilty Plea at 24 n.10.

ment (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

**A.**

Jonathan Pollard claims that by refusing to offer Anne Pollard a plea agreement unless he also entered into a plea agreement, the government overreached; it used improper, indeed unconstitutional, pressure to force him to plead guilty. We note, however, that Pollard does not contest his guilt. He does not ask for a new trial to establish his innocence. *Cf. United States v. Barker*, 514 F.2d 208, 220 (D.C. Cir.) (en banc) (in deciding whether to permit withdrawal of a guilty plea, whether defendant claims innocence is an "important factor" to consider), *cert. denied*, 421 U.S. 1013 (1975). We are not faced with the prospect that an innocent man was involuntarily compelled to plead guilty. Still, that is not dispositive. Government coercion of a certain degree and kind would invalidate the plea agreement even though Pollard does not contest his guilt. *See Fontaine v. United States*, 411 U.S. 213, 214-15 (1973) (per curiam).

Pollard first argues that the district judge did not strictly follow the dictates of FED. R. CRIM. P. 11, which requires a district judge accepting a guilty plea to advise the defendant in open court of the rights he is surrendering and to determine that his plea is voluntary and "not the result of force or threats or of promises apart from a plea agreement." FED. R. CRIM. P. 11(c) & (d). Chief Judge Robinson, although he questioned Pollard at great length as to his understanding of his rights and the significance of the plea, never *in haec verba* asked Pollard whether his plea was voluntary. *United States v. Timmreck*, 441 U.S. 780 (1979), holds, however, that failure to comply with the literal language of Rule 11 does not itself constitute the "complete miscarriage of justice" required before a court will grant a § 2255 motion.[5] *Id.* at 784.

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[5]Pollard further suggests that his wife's illness was an "aggravating factor" of the type the Court suggested in dicta in

Pollard's more substantial involuntariness argument is that wired pleas are unconstitutional. The Supreme Court has specifically reserved judgment on "the constitutional implications of a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 n.8 (1978) (emphasis in original). The circuits that have considered the question, however, while occasionally expressing distaste for the practice, have uniformly agreed that it does not, *per se*, offend due process or the privilege against compulsory self-incrimination. *See United States v. Marquez*, 909 F.2d 738, 742 (2d Cir. 1990) (citing cases from First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits), *cert. denied*, 111 S. Ct. 957 (1991).

We agree with our sister circuits that plea wiring does not violate the Constitution. The question, of course, is whether the practice of plea wiring is so coercive as to risk inducing false guilty pleas. *See Bordenkircher*, 434 U.S. at 364 n.8. To say that a practice is "coercive" or renders a plea "involuntary" means only that it creates improper pressure that would be likely to overbear the will of some innocent persons and cause them to plead guilty. Only physical harm, threats of harassment, misrepresentation, or "'promises that are by their nature improper as having no proper relationship to the prosecutor's business (*e.g.*, bribes)'" render a guilty plea legally involuntary. *Brady v. United States*, 397 U.S. 742, 750, 755 (1970) (quoting *Shelton v. United States*, 246 F.2d

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*Timmreck* might expand a § 2255 court's scope of review. *See Timmreck*, 441 U.S. at 784-85 ("we find it unnecessary to consider" whether aggravating circumstances might change the result). Case law does not indicate that her illness is the kind of factor the Court contemplated. *Cf. Johnson v. United States*, 805 F.2d 1284, 1287 (7th Cir. 1986) (stating that "aggravating factor," if it means anything at all, means only factors that rise to the level of a due process violation); *United States v. Laura*, 667 F.2d 365, 379 (3d Cir. 1981) (Stern, J., dissenting) ("being advised by a lawyer with a conflict of interest relating directly to [the] plea" is an aggravating circumstance).

571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)). Almost anything lawfully within the power of a prosecutor acting in good faith can be offered in exchange for a guilty plea. No constitutionally impermissible compulsion arises, for instance, when a defendant is forced to choose between the possibility of a mandatory minimum sentence of ten years in prison if he goes to trial or a suspended sentence on a reduced charge if he pleads. *See Brady*, 397 U.S. at 751. In *Brady*, the Supreme Court held that "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty." *Id.* at 755. Even where the defendant continues to maintain his innocence, having to face the death penalty as the price of trial does not invalidate a guilty plea, as long as the record contains adequate evidence of actual guilt. *See North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970).

We can understand how it might be thought that a threat of long imprisonment for a loved one, particularly a spouse, would constitute even greater pressure on a defendant than a direct threat to him. Whether one could generalize as to that proposition depends, we suppose, on one's view of human nature. But it does not seem to be the sort of widely-shared intuition upon which a constitutional rule should be based. We must be mindful, moreover, that if the judiciary were to declare wired pleas unconstitutional, the consequences would not be altogether foreseeable and perhaps would not be beneficial to defendants. Would Pollard, for instance, have been better off had he not been able to bargain to aid his wife? Would his wife have been better off? Would the bargaining take place in any event, but with winks and nods rather than in writing?

Nor do we believe that Mrs. Pollard's medical condition makes an otherwise acceptable linkage of their pleas unconstitutional. The appropriate dividing line between acceptable and unconstitutional plea wiring does not depend upon the physical condition or personal circumstances of the defendant; rather, it depends upon the con-

duct of the government. Where, as here, the government had probable cause to arrest and prosecute both defendants in a related crime, and there is no suggestion that the government conducted itself in bad faith in an effort to generate additional leverage over the defendant, we think a wired plea is constitutional. *See, e.g., Politte v. United States*, 852 F.2d 924, 930 (7th Cir. 1988) (emphasizing "good faith prosecution"); *Harman v. Mohn*, 683 F.2d 834, 837 (4th Cir. 1982) (probable cause and good faith); *United States v. Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979) (same). Once the government had probable cause to prosecute Mrs. Pollard and had obtained a valid indictment, it was entitled, despite her illness, to prosecute her fully—or to offer lenience for her in exchange for Pollard's plea. *See United States v. Clark*, 931 F.2d 292, 294-95 (5th Cir. 1991) (plea offered by man, who maintains his innocence, in order to help his "sick, pregnant and innocent" wife held not involuntary); *Bontkowski v. United States*, 850 F.2d 306, 313 (7th Cir. 1988) (threat to prosecute validly indicted pregnant woman does not constitute unconstitutional coercion of her husband).

At minimum, Pollard argues, wired pleas raise special dangers of coercion, so that a district court faced with such a plea must undertake a more searching inquiry into the voluntariness of the plea than would normally be required. *See, e.g., Nuckols*, 606 F.2d at 569. Even if that were so, we are satisfied that the district court adequately discharged its obligations here. The colloquy between the court and Pollard was so extensive that there could be little doubt about Pollard's willingness to plead. Pollard had several opportunities to confess any misgivings to the judge, but he never gave the slightest hint that his plea was anything other than voluntary. In fact, Richard Hibey, who was Pollard's attorney at the time, brought to the court's attention at the end of the plea proceeding a document captioned "Waiver of Trial by Jury," which Pollard had executed. And when counsel did so, he specifically stated, "I think the Court has taken care of [the waiver] under Rule 11."

**B.**

Pollard places greatest emphasis in this appeal on his arguments that the government breached the plea agreement in its allocution before Chief Judge Robinson. According to Pollard, the government made three promises to him, and it broke them all. The government stated it would seek a "substantial period of incarceration," but agreed not to ask for a life sentence. It agreed to describe to the judge the extent of Pollard's post-arrest cooperation and to say explicitly that it was of "considerable value" to the government's damage assessment, as well as to its investigation of this case and enforcement of the espionage laws. And, perhaps most problematic, Pollard claims that the government agreed to limit its allocution to the "facts and circumstances of the offenses committed."

As noted, these claims of breach of the plea agreement were brought before the sentencing district judge three years after the breaches allegedly occurred. A § 2255 motion must be brought before the same district judge who sentenced the defendant. *See* 28 U.S.C. § 2255. That judge had before him the plea agreement when he listened to the government's original argument at sentencing, so he could compare the government's arguments with the promises in the plea agreement. Looking back again, in response to appellant's § 2255 motion, the judge determined there was no breach. The standard of appellate review of such a determination—typically employed on direct appeal from sentencing—is unsettled. Several circuits review district court determinations of whether or not a plea agreement has been breached *de novo*. *See, e.g., United States v. Jimenez*, 928 F.2d 356, 363 (10th Cir.), *cert. denied*, 112 S. Ct. 164 (1991); *United States v. Moscahlaidis*, 868 F.2d 1357, 1360 (3d Cir. 1989). Several others will set aside a district court's finding concerning breach of a plea agreement only if clearly erroneous. *See, e.g., United States v. Conner*, 930 F.2d 1073, 1076-77 (4th Cir.), *cert. denied*, 60 U.S.L.W. 3359 (1991); *Raulerson v. United States*, 901 F.2d 1009, 1012 (11th Cir. 1990); *United States v. Ataya*, 864 F.2d 1324, 1327 (7th Cir.

1988). A plea agreement is a form of contract, but it is a rather unusual contract, because the judge plays an active role in overseeing its performance. Not only does the judge review and accept the agreement and observe both parties' conduct under the agreement, *see* FED. R. CRIM. P. 11(e), the judge's determination of the sentence is the ultimate action to which the agreement is directed. To argue, as Pollard does, that the government breached a plea agreement through excessive allocution implies that the judge tolerated, and presumably allowed himself to be influenced by, the excessive nature of the government's arguments. The appellant's claim, in other words, is not only that the government breached the agreement but that the district judge was swayed by the breach.

We review factual determinations of a district court (clearly erroneous) more deferentially than legal ones (*de novo*), in large part because the judge who hears the evidence and observes the demeanor of witnesses has a comparative institutional advantage over the appellate court. We think the same sort of considerations typically make a deferential standard appropriate in reviewing a district judge's determination of whether the government's allocution violated limitations in a plea agreement. Such a determination presents a mixed question of law and fact in which the factual aspects usually predominate. The district judge is surely in the best position to determine whether the government presented an argument that, perhaps subtly, exceeded the bounds of the agreement.

When a § 2255 motion is presented challenging the government's allocution at sentencing, the district judge inevitably examines the claim in light of his own recollection of how the government's arguments struck him at the time they were presented. In deferring to his judgment, we defer not to his construction of the terms of the agreement but to his assessment of whether the government's conduct violated those terms. The meaning of a plea agreement—at least its facial meaning—is of course reviewed *de novo*. Cf. *United States v. Western Electric Co.*, 900 F.2d 283, 293 (D.C. Cir. 1990) (reviewing con-

struction of a consent decree *de novo*). That is strictly a question of law. Once it is determined, however, that nothing the government said explicitly transgressed the promises contained in the agreement, the more subtle question, whether an illegal implicit appeal was made, which could turn on voice inflections or even facial expressions, is one concerning which we must afford deference to the district court.

It might be thought that the judge would find it difficult subsequently to recognize as improper an argument by the government that might have persuaded the judge. But district judges are expected to withstand improper appeals and, even when they succumb, to exercise the discipline to recognize them in hindsight. Presumably, the sentencing judge's unique vantage point is in part why Congress provided that § 2255 motions were to be brought before the sentencing judge. *See Blackledge v. Allison*, 431 U.S. 63, 74 n.4 (1977) (noting that the district judge's "recollection of the events at issue" enable him to apply the standards for collateral relief "in a somewhat different fashion" in a § 2255 proceeding). To be sure, in *Santobello v. New York*, 404 U.S. 257 (1971), the Supreme Court said that resentencing had to take place before a different judge once it determined the government had plainly breached the plea agreement, notwithstanding the judge's statement that he was unaffected by the government's argument. *See id.* at 263. The extraordinary nature of that relief (disqualification of a judge is not lightly granted) suggests to us, however, the appropriateness of according a large measure of respect to the district court's judgment in deciding whether a violation occurred in the first place.

Reviewing this sort of district court finding only for clear error is entirely consistent with our approach, and the approach of other circuits, to the review of other sorts of decrees or orders in which there is substantial judicial involvement.[6] *Western Electric* held only that

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[6]Indeed, it comports with our review of ordinary contracts. When issues of interpretation and construction predominate in an

"construction of a consent decree"—in other words "the meaning of the Decree's terms"—should be reviewed *de novo*. *Id.* There we rejected a claim for deference based upon the fact that the district judge "was also the drafter of the language at issue." *Id.* at 294. Where the issue is instead the application of that language, *i.e., violation* of the terms of a consent decree, courts typically review district court findings under a clearly erroneous standard. *See, e.g., Kendrick v. Bland*, 931 F.2d 421 (6th Cir. 1991); *Hayden v. Oak Terrace Apts.*, 808 F.2d 1269 (7th Cir. 1987); *United States v. Lulac*, 793 F.2d 636, 643 (5th Cir. 1986). Similarly, numerous courts, including our own, review findings of violations of other types of court orders in contempt proceedings under a clearly erroneous standard. *See, e.g., Dallas Gen'l Drivers, Warehousemen & Helpers, Local No. 745 v. NLRB*, 500 F.2d 768 (D.C. Cir. 1974) (civil contempt finding by Special Master for violation of NLRB order); *Glasser v. A.H. Robins Co.*, 950 F.2d 147 (4th Cir. 1991) (violation of protective order); *United States v. Costa*, 947 F.2d 919 (11th Cir. 1991) (violation of district court order); *United States v. National Medical Enters.*, 792 F.2d 906, 911 (9th Cir. 1986) (violation of scheduling orders); *NLRB v. Bancroft Mfg. Co.*, 635 F.2d 492 (5th Cir.) (civil contempt finding by Special Master for violation of NLRB order), *cert. denied sub nom. Croft Metals, Inc. v. NLRB*, 452 U.S. 917 (1981).

Here the meaning of the agreement is not in dispute; at least with respect to the first two of Pollard's claims of breach, the question is only whether the government's arguments transgressed the agreed norm. As to Pollard's first claim, it is undisputed that the government never

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ordinary breach of contract claim, we regard the issue of breach as a question of law to be reviewed *de novo*. When, however, a breach determination rests primarily on an analysis of facts, we will reverse the determination only if clearly erroneous. *See, e.g., ARB, Inc. v. E-Systems, Inc.*, 663 F.2d 189 (D.C. Cir. 1980); *W.G. Cornell Co. v. Ceramic Coating Co., Inc.*, 626 F.2d 990 (D.C. Cir. 1980).

asked, in so many words, for a life sentence. Pollard contends, however, that the very force of the government's allocution sent the district judge an *implicit* request for a life sentence. Pollard particularly objects to the two written submissions by Secretary of Defense Weinberger which, Pollard claims, contain numerous exaggerations and several veiled appeals to the sentencing judge to impose the maximum penalty.[7]

Secretary Weinberger's public statement asserted that even in a year in which several spies for the United States' main adversaries had been apprehended, it was difficult to "conceive of greater harm to national security" than that done by Pollard and that Pollard's punishment "should reflect the perfidy of his actions, the magnitude of the *treason* committed, and the needs of national security." (emphasis added). The Secretary had detailed exhaustively in his classified submission the national security information that Pollard had compromised, and he urged the court to impose a sentence "commensurate with the enduring quality of the national defense information he can yet impart." Pollard argues that by bringing to bear its "heaviest artillery"—the nation's top national security official—to provide the damage assessment, the prosecutors suggested to the sentencing judge the government's interest in seeing the maximum sentence imposed.

It is true that the government pressed its case against Pollard at sentencing with considerable force. But we do not think that in doing so the government violated its promise not to recommend a life sentence; certainly we find no clear error in the district judge's determination that the government adhered to its promise. *Cf. United States v. Benchimol,* 471 U.S. 453, 455 (1985) (per curiam) (agreement to recommend a particular sentence does not require the government to do so "enthusiastically"). We disagree with our dissenting colleague, who believes that the Weinberger memoranda calling for "severe

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[7]Pollard, for purposes of this appeal, received a redacted version of Secretary Weinberger's classified memorandum.

punishment"—reflecting the perfidy of Pollard's actions and even referring to treason—was equivalent to an appeal for a life sentence. The Secretary of Defense's statement was, in our view, just as consistent with a request for a long prison sentence that would be short of a life term. The government did not ask for a "life sentence in all but name," Dissent at 9, because it never introduced explicitly or implicitly the notion or concept of the maximum sentence; nor did it ever use words that could be thought synonymous with a life term.

The plea agreement did not commit the government to treat Pollard gently or to minimize the extent of the damage that he caused to national security. It provided: "Notwithstanding Mr. Pollard's cooperation, at the time of sentencing the Government will recommend that the Court impose a sentence of a substantial period of incarceration . . . ." And the same paragraph of the plea agreement stressed that "this agreement cannot and does not limit the court's discretion to impose the maximum sentence." Since the government reserved the right to argue for a substantial period of incarceration and *explicitly preserved the district court's discretion to impose a life sentence,* Pollard's argument that the government made an implicit plea for a life sentence necessarily rests on nuance. In this regard, we, unlike our dissenting colleague, think it telling that Pollard's counsel, who reviewed and responded to Secretary Weinberger's submissions in detail and heard the government's argument, never claimed an implicit breach of the agreement not to seek a life sentence. Counsel did dispute Secretary Weinberger's evaluation of the gravity of Pollard's misdeed, but characterized the Secretary's words—perhaps accurately—only as "rank hyperbole." The district court was, therefore, justified when it described the government as "argu[ing] for a substantial term of imprisonment, and no more." *Pollard,* 747 F. Supp. at 803.

Pollard's second claim, it will be recalled, is that the government breached its agreement with him by failing to outline adequately the extent and value of his coopera-

tion. In paragraph 4(a) of the plea agreement, the government promised to "bring to the Court's attention the nature, extent and value of [Pollard's] cooperation and testimony," which the government would represent was "of considerable value to the Government's damage assessment analysis, its investigation of this criminal case, and the enforcement of the espionage laws." In its principal sentencing memorandum, the government began its discussion of Pollard's crimes by noting that "[i]n the numerous interviews of defendant . . ., defendant has detailed the origins and scope of the espionage operation." The government then devoted twelve pages to a detailed recitation of the conspiracy, which the government acknowledged was based largely on these interviews. Following this recitation, Pollard's cooperation was described further. "The defendant has submitted to numerous post-plea debriefings . . . . During those debriefings, defendant revealed a substantial amount of information regarding the formation, conduct and extent of the espionage operation which was previously unknown to the government." The government then described in general terms the value of Pollard's cooperation: "For this reason, defendant's post-plea cooperation has proven to be of considerable value to the government's damage assessment analysis, and the ongoing investigation of the instant case." And in the following paragraph it was acknowledged "that defendant has been candid and informative in describing his wrongdoing, and that [the government] has derived benefit from the information defendant has provided."

Pollard's claim on appeal is essentially that the government's obligation to represent his cooperation as valuable implied a corollary promise not to discount that cooperation and not to tell the judge that his cooperation was limited. Pollard accuses the government of disingenuity by including the bargained-for language describing his cooperation in a section of the sentencing memorandum entitled "FACTORS COMPELLING SUBSTANTIAL SENTENCE." Primarily, Pollard objects to the govern-

ment telling the judge that his delay in cooperating with the investigators allowed the Israeli handlers to escape and also to the government's suggestion that Pollard's motive for cooperating was the desire for leniency in sentencing, not remorse for his crimes.

The government, however, never promised not to give the court a complete appraisal of its view of Pollard's cooperation. It was of considerable value, and the government said so, but it was not wholehearted; the Israeli handlers were given an opportunity to flee the country. We disagree with the dissent's statement that the government conveyed the impression that the value of Pollard's cooperation was only "slight," Dissent at 7; instead, the government legitimately pointed out that there were certain matters of considerable importance, *i.e.*, the apprehension of his handlers (which, of course, goes a long way to deter future espionage) concerning which Pollard did not cooperate.[8] Pollard contends that at the time the plea

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[8]The dissent's suggestion that the district judge in the § 2255 proceeding may have improperly interpreted the plea agreement to have permitted the government to "convey the message that Pollard's cooperation, while containing some elements of considerable value, was on an *overall* basis not worth much," Dissent at 8, is not a fair reading of the district court's opinion. After noting that the government agreed to represent that Pollard's cooperation had been of considerable value, *see Pollard*, 747 F. Supp. at 802, the district court went on to observe that

> Defendant claims that by "casting aspersions" on defendant's cooperation, the Government completely undercut the statements it made earlier. For example, the Government noted that defendant's delay in cooperating allowed certain co-conspirators to flee the United States. It was no violation of the plea agreement for the Government to explain the positive value of the cooperation in one sense (damage assessment), while also noting that defendant had frustrated Government efforts in another sense (law enforcement). The record in this case does not support the contention that the Government failed in its obligation. It did not dryly recite in a few declarative sentence[s] that defendant had cooperated. It did much more, as it had said it would.

*Id.* at 804.

agreement was reached, the government well knew the handlers had been given an opportunity to escape, and by not reserving explicitly the right to mention that to the judge, the government in effect waived the point. The argument, however, can just as easily be turned against Pollard. He could have bargained to exclude reference to the Israeli handlers. And the agreement does provide, in paragraph 4(b), that the government reserves the right "to correct any misstatements of fact at the time of sentencing, including representations of the defendant and his counsel in regard to the nature and extent of Mr. Pollard's cooperation." That provision at least suggests that the parties anticipated the judge would be given the full story of Pollard's cooperation, its value to the country and where it fell short, as well as the government's view of Pollard's motive.

Nor do we think that the manner of the government's description of Pollard's cooperation or its questioning of his motive for cooperation is determinative. The form of the memorandum, to be sure, bespeaks the grudging nature of the government's compliance, but we do not believe that the form significantly detracted from the facts presented regarding the nature of Pollard's cooperation or from the government's explicit statement of its value. And it is normally to be assumed that a defendant cooperates with the government largely—if not entirely—in hopes of a reduced sentence.

Pollard's counsel initially objected at sentencing to the government's description of his cooperation, but he subsequently abandoned this objection. *See Pollard*, 747 F. Supp. at 804 n.6. Although he reasserted it in the Rule 35 motion, in neither proceeding did he make the argument presented here. He did not claim that the plea agreement barred the government from commenting on Pollard's motive for cooperation or on Pollard's delay that permitted the Israeli intelligence agents to escape. He contended only that the affirmative value of Pollard's cooperation was understated. We think that although the government's presentation was certainly not generous—it

could well be thought stingy—it did not explicitly or implicitly violate the plea agreement. Again, we do not believe that the district court's ruling on this point can reasonably be thought clearly erroneous.[9]

Pollard's third claim of breach is, as we have indicated, more troublesome. The plea agreement in paragraph 4(b) includes the statement that the government "retains full right of allocution at all times concerning the facts and circumstances of the offenses committed by Mr. Pollard." Pollard argues that by this language the government clearly, if implicitly, agreed not to comment on his motives for committing espionage or on his character. On numerous occasions during the sentencing hearing, the government referred to Pollard's "arrogance and deception," and employed other unfavorable adjectives describing his character, such as "vengeful," "unworthy of trust," or "contemptuous." The government consistently suggested, moreover, that Pollard's spying had been motivated by greed rather than ideology.

The government disputes the meaning Pollard gives to the sentence; it claims that the language is not intended to limit the government's allocution. The only limitation the government agreed to (which itself is not explicit in the agreement) was not to ask for a life sentence or a specific term of years. One difficulty with the government's position is the comparison with Anne Pollard's plea agreement, which, in a parallel paragraph, states that the government "retains full right of allocution at all times, *including* the right to detail the facts and circumstances of the offenses committed . . . ." (emphasis added). That language in the Anne Pollard agreement certainly suggests that a full right of allocution extends to *something* beyond facts and circumstances. Pollard also notes that in his own plea agreement at paragraph 4(c) the govern-

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[9]Although our dissenting colleague agrees that the district court's judgment concerning these claimed violations of the plea agreement must be reviewed for clear error, his application of that standard appears indistinguishable from *de novo* review. *See* Dissent at 7-9.

ment reserved its "full right of allocution in connection with any Rule 35 motion," thus indicating the parties may have meant something less than a full right by adding the facts and circumstances language in the earlier clause.

Appellant relies heavily on *United States v. Moscahlaidis*, 868 F.2d 1357 (3d Cir. 1989), to support his interpretation of the "facts and circumstances" language as excluding discussion of his motive and character. In *Moscahlaidis*, the Third Circuit held that a plea agreement limiting the government's allocution to " 'the full nature and extent of [the defendant's] activities with respect to this case' " had been violated when the government commented at length upon the defendant's character. *Id.* at 1359 (quoting plea agreement). The critical factor in *Moscahlaidis*, however, was that in that case, unlike our own, the government had agreed to take *no position* concerning defendant's sentence, a promise which the Third Circuit held bound the government to make " 'no attempt at all to influence the defendant's sentence.' " *Id.* at 1362 (quoting *United States v. Miller*, 565 F.2d 1273, 1275 (3d Cir. 1977) (per curiam)). It was in that context that the prosecutor's description of the defendant's character was thought to go beyond the terms of the plea agreement.

The wording of the "facts and circumstances" clause before us, in contrast, is ambiguous. It does not, on its face, exclude commentary on Pollard's motive for committing his crime. And, as the government correctly points out, motive is generally thought—at least for any crime that requires *mens rea*—to go to the very heart of a crime, and thus is presumably included in the "facts and circumstances" of the crime. The government's discussion of Pollard's character is, perhaps, another matter. Special protections attend the admissibility of character evidence at trial, *see* FED. R. EVID. 404 and 608, and it would not be unreasonable to suppose that this type of allocution is what "facts and circumstances" excludes. However, limiting the government's allocution to the facts and circumstances of the offenses does not necessarily preclude any

comment on character, because some consideration of character is inseparable from the motivation of the defendant. In this case, for instance, it would have been artificial to permit the government to argue that Pollard committed his espionage for financial reward but rigidly exclude the suggestion that Pollard was thus greedy and self-regarding.

Given the ambiguity, Pollard contends the agreement should be construed strictly against the government, which drafted its terms, and in his favor, especially since it operates as a waiver of his constitutional jury trial rights. *See, e.g., United States v. Jefferies,* 908 F.2d 1520, 1523 (11th Cir. 1990); *United States v. Harvey,* 791 F.2d 294, 301, 303 (4th Cir. 1986). On the other hand, a good deal of weight must be placed on the contemporaneous interpretation of Pollard's counsel, who apparently thought nothing amiss when the government's allocution included an unflattering presentation of Pollard's character and motive. *Moscahlaidis* is distinguishable on those grounds as well. The defendant in that case asserted at the time of sentencing that the government's allocution breached the plea agreement. He also took a direct appeal from his sentence. *See Moscahlaidis,* 868 F.2d at 1359-60.

We find it unnecessary to decide whether the government breached the "facts and circumstances" limitation, because there is a higher and decisive barrier against which this claim of breach of the plea agreement collides. If we were to conclude that the government's allocution extended beyond "facts and circumstances" and thus breached the agreement, we do not think Pollard would be entitled to relief under § 2255. It is settled that a § 2255 motion is not meant to be a substitute for a direct appeal and that "it does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio,* 442 U.S. 178, 184-85 (1979). The government's allocution in Pollard's case, even if it had crossed the limits of the plea agreement, falls far short of a "fundamental defect" in Pollard's sentencing that resulted in a "complete miscarriage of justice"; nor was it "an omission inconsistent

with the rudimentary demands of fair procedure." *Hill*, 368 U.S. at 428; *cf. United States v. McKoy*, 645 F.2d 1037, 1040 n.3 (D.C. Cir. 1981) ("The stringent standard for post-sentence plea withdrawal motions is intended to prevent a defendant from testing the weight of potential punishment, and then withdrawing the plea if he finds the sentence unexpectedly severe.").

It is of course true that the government must keep the plea agreements it makes. Any breach of a promise that induced the guilty plea ordinarily entitles the defendant on direct review either to specific performance and resentencing before a different judge or to withdrawal of the guilty plea, as the court deems appropriate. *See Santobello v. New York*, 404 U.S. 257, 262-63 (1971). But not all breaches of plea agreements can be said to result in complete miscarriages of justice; not all call for relief under § 2255. *See United States v. Griffin*, 816 F.2d 1, 7 (D.C. Cir. 1987). Only where there has been a clear violation of a definite promise that was a significant inducement to the plea can a § 2255 court permit a prisoner to withdraw his plea. *See Machibroda v. United States*, 368 U.S. 487, 493 (1962) (guilty plea is void where induced by broken promises that deprive it of the character of a voluntary act).

Our dissenting colleague suggests that the notions of "fundamental defect" and "miscarriage of justice" are elastic terms that shift in meaning depending on the nature of the relief sought (or, more accurately in this case, offered). Thus, Judge Williams contends that for the remedy he would provide, resentencing before a new judge, the test for relief under § 2255 ("fundamental defect" that results in a "*complete* miscarriage of justice") can be satisfied by a lesser showing than would be required if the appellant sought rescission of the plea agreement. This is so because ordering resentencing before a new judge would not be "markedly more burdensome" than a resentencing remedy on direct appeal. Dissent at 13. But there is no indication that Congress, when it accepted this strict

standard for relief through FED. R. CRIM. P. 32(d),[10] meant to delegate to judges the power to lessen it if the nominal costs to the government of a particular remedy were thought to be relatively low. (We say nominal because the disqualification of the district judge always carries immense indirect costs to the judicial system.) Even the appellant, who sought before the district court and in his opening brief to this court complete rescission of the plea agreement, seems not to have perceived the dissent's distinction. Certainly there is no support in the case law for such a proposition.

Society's interest in bringing criminal appeals to an end is the reason for the high standard for relief in a collateral proceeding. *See, e.g., Timmreck,* 441 U.S. at 784. This interest in finality is a good deal broader than merely avoiding the direct costs of supplemental proceedings. *See, e.g., Coleman v. Thompson,* 111 S. Ct. 2546, 2563 (1991) (quoting *Sanders v. United States,* 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting)). Judge Williams' bi-level standard would disserve this interest by making it considerably more attractive for defendants to pursue collateral attacks on their sentences, and perhaps would create temptation for appellate judges to second guess trial judges' sentencing determinations (especially in non-Guidelines cases). We think, then, the appellant must meet the statutory standard for relief, and there is simply no way that Pollard's sentence, harsh as it is, can be thought to stem from a fundamental defect that caused a miscarriage of justice—without robbing those words of all meaning.

Judge Williams, nevertheless, would grant resentencing in this context if the government's breach create "a serious likelihood that a judge would have given a harsher

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[10]The "complete miscarriage of justice" standard was originally a judicial gloss on § 2255. *See Hill v. United States,* 368 U.S. 424, 428 (1962). When rule 32(d) was amended in 1983, the Advisory Committee Notes expressly approved that standard for § 2255 proceedings, and Congress authorized the amendment to take effect without change.

sentence" than without the breach. Dissent at 14-15. That approach would appear to require resentencing, regardless of the clarity or seriousness of the alleged breach, if appellate judges were to believe, for example, that a defendant would have received (from an untainted hypothetical judge) a prison term of 11 months rather than a year, 10 years rather than 11, or 40 years rather than life. In other words, once Judge Williams would conclude that the line of breach is crossed, no matter how subtly, he would find the "fundamental defect" and "miscarriage of justice" standard met by even a minor increase in the sentence over the one that would have been given by the hypothetical untainted judge. This analytical framework would either justify § 2255 relief for minor breaches of the plea agreement or it would invite appellate judges to weigh *de novo* the severity of the sentence imposed (or both).[11] For those reasons, all the courts that have considered alleged breaches of plea agreements—in a § 2255 context—have thought the statutory standard could be met only by a showing of clear breach of a significant provision in the agreement. We are aware of no case—neither appellant nor the dissent offers any—where relief was granted in a § 2255 proceeding based on an allegation that the government's arguments amounted to an *implicit* breach of a partially ambiguous plea agreement. A survey of nearly one hundred appellate decisions in § 2255 cases over the last twenty years reveals only four decisions granting relief to a § 2255 petitioner based on a claimed

[11]In a direct appeal of a sentencing determination, if the appellate court concludes that the government breached a plea agreement, it grants relief. The appellate court does not try to decide whether the breach caused the judge to give a greater sentence than would have been levied otherwise. As the *Santobello* Court recognized, that is an unprofitable line of inquiry because the trial judge—as did the district judge here—may well state that he was unaffected by the arguably excessive nature of the government's argument. *See Santobello*, 404 U.S. at 262-63. An appellate court should not be obliged to weigh the trial judge's credibility in the course of considering whether the breach had any effect.

breach of a plea agreement, and all of those cases involved clear violations of the agreement or federal statutes. *See Brunelle v. United States,* 864 F.2d 64 (8th Cir. 1988); *United States v. Carbone,* 739 F.2d 45 (2d Cir. 1984); *United States v. Corsentino,* 685 F.2d 48 (2d Cir. 1982); *Correale v. United States,* 479 F.2d 944 (1st Cir. 1973). The mood, atmosphere, or "rhetoric" of the government's allocution—upon which the dissent relies—might well justify relief on direct appeal of a sentence, but it is unlikely to satisfy the rigorous test of § 2255.

It does appear that the government was engaged in rather hard-nosed dealings with the appellant. But we think that Pollard's claims of government breaches of the plea agreement, which appear to us to be very much the product of revisionist thinking on the part of Pollard and his new counsel, are brought far too late, in this collateral proceeding, to enable Pollard to prevail.[12] Pollard waited three years before complaining about the government's allocution. The promise that the government arguably transgressed, to limit its allocution to the "facts and circumstances of the offenses committed," is ambiguous with regard to the types of statements the government made. The district judge was aware of all the terms of the plea agreement and did not regard the government's allocution as impermissible under the agreement. Even if, as the dissent argues, the contemporaneous lack of response from the district judge should be given no weight, *see* Dissent at 11, the same cannot be said of Pollard's counsel, who also made no objection to the government's allocution. The sentence Pollard received was within the power of the dis-

[12]Pollard also claims that the government breached its implied covenant of good faith and fair dealing by "permitting" Pollard to meet with journalist Wolf Blitzer without forcing Pollard to seek permission from the Director of Naval Intelligence, as his plea agreement called for, and then bringing up this violation of the plea agreement before the judge. Because the government was under no duty to police Pollard's compliance with the plea agreement, and because there is no evidence at all that the government connived to bring about this violation, we do not see any substance to this claim.

trict court to impose, both by the terms of the statute under which he pleaded guilty and by the explicit terms of the plea agreement. Pollard has never denied that he is guilty of the crimes for which he was imprisoned. *See Barker,* 514 F.2d at 220 (whether defendant asserts factual innocence is an important factor to be weighed in deciding whether to permit withdrawal of guilty plea). Nor is there any allegation that Pollard's guilty plea was induced by the promise of a specific sentence, which he subsequently did not receive. *Cf. Blackledge v. Allison,* 431 U.S. 63 (1977); *Machibroda,* 368 U.S at 490 n.1. Under such circumstances, it cannot be said that justice completely miscarried.

III.

In a quite unusual case, surely the most extraordinary claim raised by the appellant is his contention that the district judge improperly considered information conveyed to him *ex parte* by the government. This rather shocking charge is based on an alleged conversation between Chief Judge Robinson and former Supreme Court Justice Goldberg, who, after having been contacted by Professor Dershowitz, set out to determine the reasons for Pollard's life sentence. The *ex parte* information is said to indicate that Pollard passed information to the Israelis demonstrating United States' knowledge of secret cooperation between Israeli and South African defense agencies. The Chief Judge supposedly told Mr. Goldberg that this information "weighed heavily" in his sentencing determination. As noted earlier, Arthur Goldberg died shortly thereafter and so was not available to be questioned. But Dershowitz, we are told, has determined that Pollard did not in fact pass such information to the Israelis and that it was not included within the classified summary presented to the district judge and to Pollard's counsel at sentencing; Dershowitz then deduces that the government must therefore have conveyed this information to Chief Judge Robinson *ex parte.*

Pollard sought a hearing based on the Dershowitz affidavit and, perhaps more important, asked Chief Judge

Robinson to recuse himself. The Chief Judge refused to recuse and denied the hearing. Pollard claims the district court abused its discretion. We think very little of this claim.

A district judge must grant a prompt hearing under § 2255 unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. The decision whether to do so is committed to the district court's discretion. *See Machibroda*, 368 U.S. at 495. In making this decision, "the judge's recollection of the events at issue may enable him summarily to dismiss a § 2255 motion"; indeed, his ability to do so is one of the advantages of § 2255 relative to *habeas corpus* for state prisoners. *Blackledge*, 431 U.S. at 74 n.4. Only where the § 2255 motion raises "detailed and specific" factual allegations whose resolution requires information outside of the record or the judge's "personal knowledge or recollection" must a hearing be held. *Machibroda*, 368 U.S. at 495. Even if the files and records of the case do not clearly rebut the allegations of the prisoner, no hearing is required where his claims are "vague, conclusory, or palpably incredible." *Id.*

The district judge in this case was, of course, intimately familiar with the record and knew as a matter of fact whether or not the government had submitted *ex parte* material to him. The Chief Judge attested that it had not. He accordingly denied the motion for a hearing.[13] We believe the Chief Judge was well within his discretion to do so. The Dershowitz affidavit was a very weak submission. It did not suffice to require a hearing into the question it raised, even if the district judge had not been personally aware that Professor Dershowitz's "deductions" were fallacious. The affidavit included no direct or even hearsay evidence that an *ex parte* submission had been received. Furthermore, after examining the classified material submitted to the district judge, we understand

[13]The motion may have been designed primarily to force the judge to recuse himself.

how the subject of South Africa (if not the Jericho missiles mentioned in the affidavit) could have been mentioned in a conversation between the Chief Judge and Arthur Goldberg, without recourse to any *ex parte* materials.[14]

For similar reasons, we believe that Chief Judge Robinson did not abuse his discretion in denying Pollard's motion for disqualification. Pollard argues that Chief Judge Robinson was required to recuse himself under 28 U.S.C. § 455(b)(1), because he had personal knowledge of disputed evidentiary facts concerning the alleged *ex parte* contacts; under § 455(b)(5)(iv), because he might have been a material witness at a hearing on those allegations; and under § 455(a), because his deciding the motion alleging misconduct on his part gave the appearance of bias. The district court did not need to recuse itself under § 455(b)(1), because only personal knowledge of disputed evidentiary facts gained in an extrajudicial capacity is grounds for recusal, and any knowledge Chief Judge Robinson had concerning the government's sentencing submissions came directly from his participation in the case. *See United States v. Heldt*, 668 F.2d 1238, 1274 (D.C. Cir. 1981) (per curiam), *cert. denied*, 456 U.S. 926 (1982). Likewise, the district court could not be disqualified for bias, because the bias alleged "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Heldt*, 668 F.2d at 1274. Finally, Chief Judge Robinson was not required to recuse himself as a potential material witness, because, as we noted above, he acted within his discretion in denying a hearing.[15]

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[14]Indeed, on pages 34-36 of Pollard's own Second Memorandum In Aid Of Sentencing, there appears a section entitled "The South African Affair," discussing Pollard's involvement in intelligence-sharing with South Africa.

[15]Assuming *arguendo* that the district judge's refusal to direct the United States Attorney to provide Pollard's new counsel with access to the Weinberger classified submission was erroneous, our examination of the material satisfies us that the error was harmless.

* * * *

The issue before us as appellate judges is not whether a life sentence was appropriate punishment for Pollard's crime, still less whether we ourselves would have imposed such a sentence. It is rather whether the appellant has mounted a sufficient challenge to the actions of the government and the district judge to clear the formidable barriers to relief in a collateral challenge to his sentence under § 2255. We think not. Accordingly, we affirm the judgment of the district court.

*It is so ordered.*

WILLIAMS, *Circuit Judge*, dissenting in part: I agree with the majority that the "plea wiring" was not an unlawful coercion of Pollard's guilty plea and that Chief Judge Robinson did not abuse his discretion in refusing to recuse himself or to conduct a hearing into the claim of ex parte contacts. But because the government's breach of the plea agreement was a fundamental miscarriage of justice requiring relief under 28 U.S.C. § 2255, I dissent.

Before turning to the specifics of the government's failure to behave at sentencing as it had promised, there are some preliminary matters.

1. *"Cause and prejudice"*: Relief is to be granted under 28 U.S.C. § 2255, the statutory replacement of common law habeas, if the petitioner shows a "fundamental defect [resulting in] a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962). If the petitioner failed to lodge a contemporaneous objection to the challenged ruling, and failed to appeal, then he may also have to show "cause and prejudice", the first to excuse his "double procedural default", the second to show the actuality of injury from the error. See *United States v. Frady*, 456 U.S. 152, 167-68 (1982). The government argues that Pollard must show cause and prejudice because he failed to object to the government's allocution and to appeal his sentence. Because the majority believes that Pollard has not satisfied even the "fundamental defect" standard, it need not address "cause and prejudice", see Maj. Op. at 10-11, but I must.

As the government at no point below asserted the cause and prejudice standard, it has waived the defense. At best the government may be said to have grazed the issue. In its Opposition to Motion to Withdraw Guilty Plea it noted the three-year delay between sentencing and Pollard's § 2255 motion, *id.* at 5-6, the failure of Pollard to object to the government's allocution at the sentencing hearing, *id.*, and Pollard's "waiver" of his claim that the government failed to describe his cooperation adequately, *id.* at

24 n.10. But the government made the first two points solely to boost an argument that Pollard did not at the time of allocution consider its conduct a breach, and it made the last in a vague footnote throwaway line without mention of the "cause and prejudice" standard or citation to any case invoking that standard. A party demanding strict adherence to principles of finality is in a weak position to ask that its own lapses be disregarded, and accordingly the circuit courts have treated government silence as a waiver. See, e.g., *United States v. Hicks*, 945 F.2d 107, 108 (5th Cir. 1991); *United States v. Hall*, 843 F.2d 408, 410 (10th Cir. 1988); *United States ex rel. Bonner v. DeRobertis*, 798 F.2d 1062, 1066 (7th Cir. 1986); but cf. *Titcomb v. Virginia*, 869 F.2d 780, 782-84 (4th Cir. 1989) (no waiver where "it would appear" that the state raised the issue in its second response and where the evidence of the procedural default was part of record). Finding waiver is especially sensible where, as here, relief can take the form of an order merely requiring resentencing, not a vacation of the plea, so that the government is most unlikely to suffer any injury from loss of memories or other evidence.

2. *Deference:* My understanding of the scope of our review is largely similar to the majority's. We review a trial court's *interpretation* of a plea agreement de novo, just as we review an interpretation of an ordinary contract de novo (unless the interpretation turns on extrinsic evidence). See, e.g., *Hoh Co. v. Travelers Indem. Co.*, 903 F.2d 8, 12 n.6 (D.C. Cir. 1990) (contract interpretation); *United States v. Western Electric Co.*, 900 F.2d 283, 294 (D.C. Cir. 1990) (interpretation of civil settlement); see also Maj. Op. at 17-18. We review a trial court's findings of *pure fact* (what happened) under the clearly erroneous standard. And we defer to district court findings even on fact-intensive issues of *characterization*, such as whether particular conduct, about which there is no factual dispute, violates a norm that courts have defined with as much clarity as they can expect to achieve. Thus in *Kendrick v. Bland*, 931 F.2d 421 (6th Cir. 1991), the court

applied the clearly erroneous standard to findings as to whether specific conduct by prison officials — e.g., cancellation of club activities — constituted "institution-wide" violations of a consent decree.

The appellate deference in this last category is somewhat anomalous, as the characterization is in a way part of the law-finding process; it answers a normative question (whether the conduct was acceptable or not), and thus in some measure refines the norm. But where the characterization process is extremely fact-intensive, the appellate decision may not yield a useful contribution to the formulation of legal rules, so that appellate judges' duplication of the trial court's effort would consume judicial resources for very little return.[1] See *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 933-36 (7th Cir. 1989) (*en banc*) (Easterbrook, J.). By the same token, however, review for clear error cannot fade off into complete deference, else the appellate court's law-finding (or law-forming) function would be disconnected from the real world. Moreover, presumably because of a recognition of the law-forming aspect of fact-intensive characterizations, the decisions on deference appear replete with contradictions and inconsistency. See Wright & Miller, Federal Practice and Procedure §§ 2585-89 (1971 & Supp. 1990). Perhaps one can do no better than to say that there is deference, but that the special character of the practice informs its nature.

Where a defendant claims that the government's allocution breached a plea agreement, there is no deference to the sentencing judge's view of the actual *effect* of the allocution on him or her (as opposed to the projected or inferred effect on a hypothetical judge). Compare Maj. Op.

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[1]It could be argued that the interpretation of specific contract language, in the absence of extrinsic evidence, is also a form of fact-specific characterization. But the "product" of interpretation is the articulation of a norm, i.e., a paraphrase of the contract language for application to particular types of conflicts, so that the process would seem to require appellate courts to rule de novo so as to achieve uniform rules as nearly as possible.

BEST AVAILA

at 17-18. This is for the simple reason that the actual effect on the actual judge is irrelevant. *Santobello v. New York*, 404 U.S. 257 (1971), put any such inquiry out of bounds, perhaps because the sentencing judge would be in an awkward position making "findings" about his own state of mind. The Court ordered relief despite declaring that it had "no reason to doubt" the judge's statement that "the prosecutor's recommendation did not influence him". *Id.* at 262-63.

3. *Principles of plea interpretation:* The majority correctly notes that Pollard's argument in some respects "rests on nuance", Maj. Op. at 21, and that the government did not ask for a life sentence "in so many words", *id.* at 20, or use "words . . . synonymous with a life term", *id.* at 21. Without explicitly setting forth a general approach, the majority appears to apply a principle that the government should be held only to the letter of its bond.

Such an approach puts an impossible burden on contract drafters. A party cannot anticipate every evasive move that another party may make, or every opportunity for evasion. Brittle interpretation makes for long contracts, and even the longest will have loopholes. Accordingly, as with other contracts, courts ordinarily reject literalism and read plea agreements as a reasonable person would understand them. *United States v. Moscahlaidis*, 868 F.2d 1357, 1361 (3d Cir. 1989) (citing cases); *United States v. Carbone*, 739 F.2d 45, 46 (2d Cir. 1984); *United States v. Crusco*, 536 F.2d 21, 26 (3d Cir. 1976) (criticizing "stubbornly literal" reading of plea agreement).[2] Finding an implicit duty of good faith,

[2]The 9th Circuit commonly says that plea agreements should be interpreted *both* as a reasonable person would understand them and literally, see, e.g., *United States v. Travis*, 735 F.2d 1129, 1132 (9th Cir. 1984), despite the apparent contradiction. But the case repeatedly cited in favor of literalness does not support such a view. *United States v. Garcia*, 519 F.2d 1343, 1344 (9th Cir. 1975) (finding breach of plea agreement because govern-

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though it may sound more drastic, amounts to the same thing if it is understood as "a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute." *Market Street Associates Ltd. Partnership v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991). Thus in *United States v. Bowler*, 585 F.2d 851, 853-54 (7th Cir. 1978), the court construed a provision that the government's sentencing recommendations "may be reduced, based upon [various] personal factors" to include an implicit promise to consider the factors specified. See also *United States v. Brown*, 500 F.2d 375 (4th Cir. 1974) (prosecutor's statement to the judge that he recommended three years because of the plea agreement, though he had "some problems" with this sentence, violates agreement to recommend no more than three years); *Snowden v. State*, 365 A.2d 321 (Md. Sp. Ct. App. 1976) (promise to recommend probation breached by prosecutor who did so but, when asked by the judge whether he still adhered to this promise, said, "I believe we must, I believe we must").

Judicial insistence on a reasonable and not a niggling interpretation for plea agreements is hardly surprising. The defendant has given up his right to a trial that satisfies due process, so if a plea rests "in any significant degree on a promise or agreement of the prosecutor . . . , such promise must be fulfilled." *Santobello*, 404 U.S. at 262. If fulfillment of the promise is to mean anything, it cannot refer only to the promise pared to its literal bone. While the government is a repeat player in this field and has an interest of its own that its word be good, experi-

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ment failed to abide *even* by the literal terms of the contract — no discussion of whether the violation had to be of the literal terms for it to be remediable), while the case typically cited for the reasonable person standard indeed favors the reasonable person perspective, *United States v. Arnett*, 628 F.2d 1162, 1164 (9th Cir. 1979) (court looks to the facts of each case to decide what was "reasonably understood by [defendant] when he entered his plea of guilty," quoting *Crusco*, 536 F.2d at 23, 27, and the terms of agreement are determined by "objective standards").

ence in the commercial world shows that even repeat players lapse. Here, too, reasonable judicial enforcement not only assures fairness to the individual who may be the victim of a slip-up or of an agent's excessive zeal, but also makes it easier for the government to build confidence in its word.

* * *

Pollard's plea agreement required him to plead guilty and to cooperate. On its side, the government made three promises of significance here. First, it would bring to the court's attention "the nature, extent and value of [Pollard's] cooperation and testimony" and would represent that the information supplied was of "considerable value to the Government's damage assessment analysis, its investigation of this criminal case, and the enforcement of the espionage laws." Maj. Op. at 5. Second, it would not ask for a life sentence (this promise was implicit but is not contested by the government), though it would be free to recommend a "substantial period of incarceration". *Id.* at 5-6. Third, the government limited its reserved right of allocution to "the facts and circumstances" of Pollard's crimes. *Id.* at 6. The government complied in spirit with none of its promises; with the third, it complied in neither letter nor spirit.

Though the government obligated itself to call attention to the "considerable value" of Pollard's cooperation, in its principal sentencing memorandum it buried its sole discussion of that cooperation in a section entitled "FACTORS COMPELLING SUBSTANTIAL SENTENCE". The first paragraph of this section discussed the extent of Pollard's offense, saying that he had compromised "thousands of pages of classified documents", and recommended a "substantial period of incarceration". J.A. 160. The second paragraph called Pollard's activities a "flagrant breach of . . . trust", a breach "all the more venal in that [despite Pollard's contrary claims] it is clear that the money and gifts provided by the Israelis were signifi-

cant, if not the primary factors motivating defendant". *Id.* at 161. The third paragraph said that Pollard "will undoubtedly urge the Court also to consider his post-arrest conduct, i.e., [his] submission of a plea of guilty and his cooperation . . . ," and noted the obvious point that plea bargaining and cooperation "may be considered by courts at the time of sentencing." *Id.* In paragraph four the government provided nominal compliance with its promise, saying that Pollard "revealed a substantial amount of information regarding . . . the espionage operation which was previously unknown to the government" and that this cooperation "has proven to be of considerable value to the government's damage assessment analysis, and the ongoing investigation of the instant case".[3] *Id.* at 162. In the fifth paragraph, though acknowledging that the defendant had been candid and informative, the government told the court that Pollard delayed his cooperation in order to assist the escape of three coconspirators, devoting more space to this caveat than to its favorable words for Pollard's cooperation. *Id.* The rest of the section, of course, went on with further denunciations.

Thus the government came forth with the magic words "of considerable value", and it even mentioned two of the three general areas of inquiry, specified by the agreement, to which Pollard's cooperation contributed. But by placing the discussion square in the middle of its reasons why the sentence should be substantial, and by its heavy stress on the cooperation's imperfections, it succeeded in conveying the impression that, *overall,* the value was not "considerable" but slight. Perhaps the value was slight, but if so, then the government should not have embraced an obligation to say the contrary. In *United States v. Fisch,* 863 F.2d 690 (9th Cir. 1988), the court found a plea agreement violated where the government, though obliged to tell the court of defendant's cooperation, neither offered details on its own nor endorsed the defense account, say-

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[3]Note the omission of any reference to the value of Pollard's cooperation to "the enforcement of the espionage laws", the only broad purpose mentioned by the plea agreement.

ing only that defendant had "been cooperating in helping prosecute the coconspirators". The government's breach here is no less.

It is not clear from the district court's rejection of this claim whether the court construed the agreement as leaving the government free to convey the message that Pollard's cooperation, while containing some elements of considerable value, was on an *overall* basis not worth much, or whether the court found that the government had said that the cooperation was of considerable value overall. See *United States v. Pollard,* 747 F. Supp. 797, 804 (D.D.C. 1990). If the first, I think the contract interpretation was wrong; if the second, I believe the finding was clear error.

On the promise not to ask for a life sentence, the government coupled its adherence to the letter with an even more flagrant violation of the agreement's spirit. It presented memoranda from Secretary of Defense Weinberger saying that "no crime is more deserving of severe punishment than conducting espionage activities against one's own country", J.A. 467, that "it is difficult for me . . . to conceive of a greater harm to national security than that caused by the defendant", *id.* at 263, and that "the punishment imposed should reflect the perfidy of [his] actions, the magnitude of the treason committed, and the needs of national security", *id.* at 264.

While these remarks did not expressly endorse a life sentence (or use a synonym, compare Maj. Op. at 21), the repeated use of superlatives implied an appeal for the maximum. Weinberger's reference to treason took the point further. Whereas treason carries the death penalty, 18 U.S.C. § 2381, and involves aiding the nation's *enemies,* U.S. Const., Art. III, § 3, cl. 1, Pollard was charged with espionage, carrying a maximum of life imprisonment and encompassing aid even to friendly nations — here, Israel. Of course the sentencing judge knew the difference, but the government's barrage expressed a viewpoint that the government had promised not to express. Weinberger's

subtext was that the heaviest possible sentence was the lightest that was just. The trial court's conclusion to the contrary, 747 F. Supp. at 803, was clearly erroneous.

That the government had reserved the right to seek "a substantial period of incarceration" does not change the analysis. Compare Maj. Op. at 21. Of course the government remained free to lay out the details of the crime and its impact on national security. These, coupled with an explicit plea for a substantial sentence, might well have secured the government's objective. But the availability of these methods scarcely entitled it to wheel out the heaviest rhetorical weapons, calling for a life sentence in all but name.

Finally, despite its agreement to confine its allocution to "the facts and circumstances" of the offenses, the government told the district judge that Pollard's expressions of remorse were "both belated and hollow", J.A. 371, and "grounded in the fact he was *caught*" (emphasis in original), *id.*; that Pollard was a "recidivist" who was "contemptuous of this Court's authority" and "unworthy of trust", *id.* at 359; that Pollard felt "blind contempt" for the U.S. military, *id.* at 318, and had a "warped" and "skewed" perspective, *id.* at 319; that Pollard was "traitorous", *id.* at 369, "arrogant [and] deceitful", *id.* at 315 (and see *id.* at 316, 320), "without remorse", *id.* at 179 (and see *id.* at 163), and "literally addicted to the high lifestyle funded by his espionage activities", *id.* at 167. The assistant U.S. Attorney noted that he (the assistant) had been brought up to regard two sins as "unforgivable", arrogance and deception — *id.* at 313, precisely the two sins that he repeatedly imputed to Pollard. Pollard's "loyalty to Israel transcends his loyalty to the United States," said Secretary Weinberger. *Id.* at 265. The government devoted much space to marshalling evidence that Pollard was driven by greed ("enamored of the prospect for monetary gain", *id.* at 165; motivated by "the lure of money", *id.* at 168), and not materially affected by anti-terrorist concerns, *id.* at 164-69, or, by implied extension, by any sympathy for Israel.

The government contends that in the phrase by which it retained "full right of allocution at all times concerning the facts and circumstances of the offenses", the limiting reference to "facts and circumstances" was a nullity. This is hard to swallow. As the majority points out, the contrast with the language in Anne Pollard's plea agreement suggests that here the parties intended to exclude some otherwise acceptable elements of an allocution. See Maj. Op. at 25-26.

I agree with the majority that "facts and circumstances" include matters going to Pollard's motivation. But one can address motive by detailing specifics, leaving the moral and legal conclusions alone, to be settled by the judge. This is the line drawn by the court in *Moscahlaidis*. There the government was obliged by its agreement to "take no position" on the sentence, but was allowed to speak of "the full nature and extent of [the defendant's] activities with respect to this case". 868 F.2d at 1359. The court found that the agreement barred the government from asserting its opinion of the defendant's character with phrases alluding (for example) to "the depth of [his] greed and moral bankruptcy" and a "demonic pursuit demonstrat-[ing] [his] utter contempt for the welfare of his fellow man", *id.* at 1362. Though the structure of the agreement was different from Pollard's, the Third Circuit's line — between fact and opinion — makes equal sense here.[4]

So the government was free to relate not only the intelligence implications of Pollard's acts, but also details sup-

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[4]Although the court in *Moscahlaidis* relied in part on the government's having obliged itself to "take no position" on sentencing, this hardly makes the decision irrelevant. Compare Maj. Op. at 26. There the language *allowing* government commentary was broader — "the full nature and extent of [defendant's] activities". 868 F.2d at 1362. Without the "take no position" constraint, this might well have left it free to say anything. Here the "facts and circumstances" language is narrower, and, as was true of "full nature and extent" in *Moscahlaidis*, its meaning is shaded by a related obligation — not to seek a life sentence. See also the passage two paragraphs below, noting the synergies in the government's promises.

porting an inference that his motive was pecuniary. But if the limit meant anything, it could not allow the government to wrap the raw facts in an inflammatory rhetoric, endlessly alluding to its (necessarily subjective) opinions that Pollard was greedy and immoral, depicting his conduct as the apogee of espionage, naming him a traitor, and delivering a tirade on his "arrogance and deceit".

Taken together, the government's three promises worked a substantial restraint on the government's allocution. Its commitments to restrict itself to facts and circumstances, and to assess Pollard's cooperation as having considerable value, closed off a means by which it might demand a life sentence in all but name. Safely after the fact, the government's briefing here undermines its commitment, isolating the components of the promise in order to conceal their synergies.

Is it troubling that the breaches involve matters of rhetoric? It means, of course, that the violation cannot be measured mathematically. But that is often true in contract disputes — most obviously whenever courts enforce express or implied duties of "reasonable" performance. Further, courts frequently draw the line between facts and legal or moral conclusions in classifying the testimony of lay witnesses. See Fed. R. Evid. 701; compare *United States v. Slade,* 627 F.2d 293, 305 (D.C. Cir. 1980) (finding lay references to defendant's drug "organization" to be equivalent of improper assertion of conclusion that it was conspiracy) with *Williams Enterprises, Inc. v. Sherman R. Smoot Co.,* 938 F.2d 230, 233-34 (D.C. Cir. 1991) (permitting lay testimony by insurance broker on relation between accident and insured's increased premium). Is rhetoric simply too trivial? To say so would, I think, buck prevailing views of human psychology. When the majority relies on the district judge's failure to note a breach at the time of the allocution, see Maj. Op. at 31, it assumes that the judge was unaffected by the government's efforts to disparage Pollard's character, thereby resolving an unanswerable question and perhaps violating *Santobello,* which ordered relief despite the trial judge's assertion —

accepted by the Court — that the improper allocution had not influenced him. 404 U.S. at 262.

Do the breaches amount to the "complete miscarriage of justice" required for relief under § 2255? The cases under § 2255 (and § 2254),[5] quite frankly, leave a gap between two patterns — conduct clearly violating even the literal language of the agreement (eliciting relief), and conduct varying from the agreement only trivially (eliciting none). Typical of the first pattern is *Brunelle v. United States,* 864 F.2d 64, 65 (8th Cir. 1988), where despite an agreement to recommend an "unspecified period", the government expressly suggested the maximum. See also *United States v. Birdwell,* 887 F.2d 643 (5th Cir. 1989) (where incorporation of a state plea agreement into a federal one induces defendant to accept the latter, the state authorities' failure to follow through undermines the federal plea); *Smith v. Blackburn,* 785 F.2d 545 (5th Cir. 1986) (state's promise that defendant would be released upon parole breached when parole was denied); *Carbone,* 739 F.2d 45 (prosecutor's objection to defendant's request for sentence allowing early parole violated promise to make no recommendation); *United States v. Mercer,* 691 F.2d 343 (7th Cir. 1982) (failure by court to allow defendant to withdraw plea, when conditions specified in the agreement as permitting withdrawal occurred, required vacation of plea); *Correale v. United States,* 479 F.2d 944 (1st Cir. 1973) (where prosecutor promised to recommend sentence that would make defendant eligible for federal parole when he received parole under state sentence, noncomplying recommendation breached promise and entitled defendant under § 2255 to resentencing).

On the other side is *United States v. Benchimol,* 471 U.S. 453 (1985), where the government had agreed to recommend probation, and, when defense counsel informed the court of the agreement, the assistant U.S. attorney

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[5]The discrepancy between the majority's survey of one hundred cases, Maj. Op. at 30-31, and this account, which is illustrative only, is that the majority leaves out the § 2254 cases.

said, "That is an accurate representation." *Id.* at 455. The Court refused to upset the sentence under § 2255, viewing it as a case where the prosecutor simply "left an impression . . . of less-than-enthusiastic support for leniency." *Id.* at 456 (inner quotations omitted). *Benchimol* scarcely helps the government much here. It is one thing to say that the government need not fulfill its obligations with gusto, or with the right tone of voice, and quite another to say that it may fill its allocution with ardent declamations that wholly undermine any nominal compliance.

On the facts the closest case is *Moscahlaidis,* where the government similarly loaded its allocution with inflammatory rhetoric inconsistent with the reasonable meaning of the agreement. See p. 10 above. There the court, *on appeal,* ordered relief. As the "miscarriage of justice" standard is more demanding than the standard of review on appeal, *Moscahlaidis* would not control this case even in the Third Circuit. But how much more should be required? In the nature of things the difference in standards is elusive. It arises, moreover, out of the fact that in the ordinary habeas case the defendant's prior failure to object makes any remedy more costly for the system than it would have been: in a new trial, the government will be hobbled by the staleness of its evidence and the risk of an erroneous acquittal will be higher. Where the remedy is not markedly more burdensome than it would have been on appeal (resentencing only), the increment implicit in "fundamental defect" should be correspondingly modest.

It is hardly surprising that the exact stringency of the "fundamental defect" standard should vary with the context. The scope of a right may turn on the character of the remedy sought. Much of the law of equitable remedies revolves around the point that courts may treat the same conduct as actionable when the plaintiff seeks damages and not actionable when he seeks an injunction. See, e.g., Restatement (Second) of Torts § 941 & comment c (1979) (injunctive relief should be withheld for nuisances where balance of hardships so dictates, even though damages

are to be awarded); *Harrisonville v. W.S. Dickey Clay Manufacturing Co.*, 289 U.S. 334 (1933) (same); *York v. Stallings*, 341 P.2d 529 (Or. 1959) (same); *Stuttgart Electric Co., Inc. v. Riceland Seed Co.*, 802 S.W.2d 484 (Ark. App. 1991) (encroachment warrants remedy of damages, not of injunction). In ordinary contract law (the closest parallel to plea agreement rules), an obligee who like appellant fails to protest a breach immediately may lose his right to *cancel* the agreement (paralleling vacation of the plea) but not his right to *damages* (paralleling resentencing). See, e.g., UCC §§ 2-711, 2-714 (buyer has option upon delivery of rejecting nonconforming goods or of obtaining damages; within reasonable time after delivery he may only obtain damages). Further, exactly the same phrase may have different meanings even within the same rule. While appellate courts review *all* factual findings of district courts under the "clearly erroneous" standard, whether "based on oral or documentary evidence", Fed. R. Civ. P. 52(a), the Rule also instructs that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses", giving the latter type of evidence a special status.

The majority suggests that as the Advisory Committee notes on the 1983 amendment to Fed. R. Crim. P. 32(d) endorsed the "complete miscarriage of justice" standard for § 2255, Congress's failure to reject the amendment affirms that view of § 2255. Maj. Op. at 29 n.10. The argument is quite persuasive as to plea *withdrawals*, which are the *sole* subject of Rule 32(d) and (therefore) of the Committee's discussion, but the sequence surely affords little evidence that Congress addressed either the standard for § 2255 requests for *resentencing*, or the character of the "fundamental defect" standard as applied to such relief. Here, then, as a remand for resentencing would preserve the plea, that relief should be given if the government's misconduct in allocution — the gap between its actual and its promised conduct — was so great as to create a serious likelihood that a judge[6] would have given

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[6]Measured by *Santobello's* objective standard, not by reference to the particular sentencing judge.

a harsher sentence.[7] The gap here seems easily broad enough to create that risk.

Pollard's sentence should be vacated and the case remanded for resentencing. This should occur before a new judge, as *Santobello* indicates, even though "the fault here rests on the prosecutor, not on the sentencing judge." 404 U.S. at 263. See also *Moscahlaidis,* 868 F.2d at 1363 n.7 (same); *Corsentino,* 685 F.2d at 52.

* * *

Though I do not wish to be too critical of the government, and though the analogy is inexact on some points, the case does remind me of Macbeth's curse against the witches whose promises — and their sophistical interpretations of them — led him to doom:

> And be these juggling fiends no more believ'd,
> That palter with us in a double sense;
> That keep the word of promise to our ear,
> And break it to our hope.

Macbeth V, vii, 48-51.

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[7]The majority's statement that this test would require resentencing where "a defendant would have received . . . a prison term of 11 months rather than a year", Maj. Op. at 30, misconceives my position. Deciding whether the government's breach created a serious likelihood of an effect on a hypothetical judge is completely independent of the penalty imposed.

## APPENDIX B

**United States District Court,**
**District of Columbia.**

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**Crim. No. 86-0207-AER.**
**747 F. Supp. 797**

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UNITED STATES of America,

Plaintiff,

v.

Jonathan POLLARD,

Defendant.

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**Sept. 11, 1990.**

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### MEMORANDUM

AUBREY E. ROBINSON, Jr., Chief Judge.

Nearly four years after pleading guilty to one count of conspiracy to commit espionage in violation of 18 U.S.C. § 794(c), defendant moves on several grounds to withdraw the plea and to stand trial. He files his motion under 28 U.S.C. § 2255. Defendant also moves that his counsel now be provided with access to certain materials made available to him and to the Court at sentencing, namely the classified memoranda submitted both by the Government and by then-Secretary of Defense Caspar Weinberger. Finally, defendant has supplemented his Motion to Withdraw Guilty Plea with an additional claim, previously maintained under seal, that the Government had *ex parte* contact with the Court prior to sentencing. Based upon the allegations this

pleading contains, he also moves that the Court disqualify itself under 28 U.S.C. § 455.

The motion to disqualify and related materials, which the Court will now unseal,[1] has no basis and as explained below, will be denied. Because the disqualification motion challenges the ability of the Court to continue to hear this matter generally, the Court will address it first, as well as the substance of the section 2255 claim from which it arises. In addition, the Court has given careful consideration to each of the substantive claims in defendant's initial motion, and concludes that they too are without merit. Lastly, the Court finds that defendant's new counsel is not now entitled to examine the Weinberger Declaration or other classified sentencing memoranda. For the reasons that follow, defendant's motion to withdraw his plea will be denied without the discovery or hearing to which he believes he is entitled.

## I. *The Court's Alleged Receipt of Ex Parte Material and Defendant's Motion to Disqualify the Court Pursuant to 28 U.S.C. § 455*

A specific and supplemental ground offered as a basis for withdrawing his guilty plea leads defendant to argue that the Court cannot hear this matter because it is a witness to material facts and must testify at some future hearing. Defendant has submitted the sworn affidavit of Professor Alan Dershowitz.[2] In this affidavit, Professor Dershowitz reports a series of communications he had with former Supreme Court Justice Arthur Goldberg, who is

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[1] Defendant's Supplemental Memorandum in Support of Motion to Withdraw Guilty Plea was originally placed under seal on the advise of the Court Security Officer that it contained classified material. Subsequent review revealed that the material is not classified. Consequently, there is no basis to maintain this and related pleadings under seal.

[2] Although in his affidavit Professor Dershowitz advises that he is one of defendant's lawyers, he has entered no appearance in this case.

now deceased. Dershowitz alleges that before he died, Justice Goldberg told Dershowitz of a conversation he claimed to have had with this Court regarding the sentence given defendant. In this conversation, as reported by Justice Goldberg to Mr. Dershowitz, the Court allegedly stated that in sentencing defendant, it relied upon certain materials provided by the Government to the Court *ex parte*.

These materials supposedly indicated, falsely, that defendant provided United States satellite intelligence to Israel about Israeli missile programs in South Africa. Defendant believes that if the allegations in Mr. Dershowitz' affidavit are true, the Government violated its plea agreement with him and he is therefore entitled to withdraw his plea. He can only pursue this inquiry through an evidentiary hearing. According to defendant, the only available witness who can testify about the matter is the Court. Hence, the Court must disqualify itself.

Title 28 of the U.S. Code, section 455 provides that a Judge of the United States shall disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). In addition, "[h]e shall also disqualify himself . . . [w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." *Id.* § 455(b). Defendant's focus in involving the section is upon the role he perceives for the Court in shedding light on the question whether any *ex parte* communication occurred. Recusal is required, he argues, both because the Court has personal knowledge regarding this disputed fact and because, given his allegations, a reasonable person may have doubts concerning the Court's impartiality.

Of course, to justify disqualification the Court's knowledge of disputed facts, or any alleged bias, must have an extrajudicial source. "[K]nowledge gained through the court's judicial role is not 'personal' knowledge within the meaning" of section 455. *United States v. Heldt*, 668 F.2d

1238, 1274 (D.C.Cir.1981), *cert. denied*, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982). Moreover, "alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge leaned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966).

Here, the knowledge at issue—whether the Court received any information about defendant from the Government *ex parte*—is clearly knowledge gained by the Court in its judicial role. The Court "knows" that it did not receive such information, as is in fact the case, because and only because of its participation in this criminal action against defendant. The Government cites two cases which indirectly bolster this point. In *United States v. Hillsberg*, 812 F.2d 328 (7th Cir.1987), *cert. denied*, 481 U.S. 1041, 107 S.Ct. 1981, 95 L.Ed.2d 821 (1987), the trial court received a letter from the defendant's mother. Defendant argued that the letter gave the court personal knowledge of disputed evidentiary facts and put its impartiality in question. According to the Seventh Circuit, "Hillsberg's mother wrote to the trial judge as the judge in her son's cases so he received the letter in his judicial capacity." *Id.* at 335. *See also United States v. Meester*, 762 F.2d 867, 885 (11th Cir.1985) (no recusal required because of phone call from bondsman reporting defendant's escape, which court received in judicial capacity, or from review of *ex parte* evidence and denial of motion for access, action which Court took in judicial capacity).

Defendant correctly points out that these cases miss the mark somewhat, but he does so for the wrong reason. The court's "knowledge" in *Hillsberg* and *Meester* came from the *ex parte* materials themselves. Here, the threshold issue is whether contact occurred at all. Thus, pointing to the open and proper—undeniably "judicial"—manner in

which the court acted in these and similar cases,[3] defendant posits that the alleged *ex parte* communication here would have been "received by the court without notice and without opportunity to object." According to defendant, "this does not constitute proper judicial action," and presumably therefore could not lead to knowledge gained in a judicial capacity. *See* Def. Reply to Gov't Opp. to Mot. to Disqualify at 8 n. 7. This may or may not be so.[4] The question

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[3] *See Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1301 (D.C.Cir.1988) (motion based upon judge's prior ruling from bench), *cert. denied*, 488 U.S. 825, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988); *United States v. Heldt*, 668 F.2d 1238, 1272 (D.C.Cir.1981) (motion based upon security measures taken by trial court), *cert. denied*, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982); *United States v. Widgery*, 778 F.2d 325, 328 (7th Cir.1985) (alleged knowledge of judge of disputed facts derived exclusively from trial).

[4] Defendant cites *Price Bros. co. v. Philadelphia Gear Corp.*, 629 F.2d 444 (6th Cir.1980), and *United States v. Van Griffin*, 874 F.2d 634 (9th Cir.1989), for the proposition that improper judicial conduct is not within the Court's duties and therefore may violate § 455. Again, that may be so, but the these cases simply do not control here. In *Price Brothers*, the judge allegedly sent his law clerk to gather evidence. Thus, he gained knowledge of disputed facts on his own initiative and utterly independent of his role as judge.

*Van Griffin* dealt with the circumstance where a magistrate failed to dispossess himself of an *ex parte* law enforcement report, an action which the Ninth Circuit held would cause a reasonable person to doubt his impartiality. The issue was bias, not knowledge of disputed facts. Of course, defendant here claims that his allegations create a similar doubt. *See* Def.Mot. to Disqualify at 5. But his case is not similar. There was no factual issue in *Van Griffin*. The Magistrate admittedly received and retained the report and, faced with this mistake, he should have granted Van Griffin's motion to disqualify.

In this case, even assuming the bias alleged was extrajudicial, defendant plainly poses a factual dispute on which the existence of bias must turn: whether *ex parte* contact occurred. If the allegation is baseless, there is no actual or apparent partiality, and the court may deny even a hearing on the recusal motion. *See United States v. Rivera*, 802 F.2d 593, 601 (2d Cir.1986); *United States v. Balestrieri*, 779 F.2d 1191, 1202 (7th Cir.1985) ("[T]he judge is free to make credibility determi-

is irrelevant because the "judicial capacity" issue in this case does not turn upon the propriety or impropriety of the conduct alleged by defendant. The issue is the Court's *knowledge* of what actually happened. Defendant's proposed inquiry into what the Court *knows*—again, whether contact occurred—could only be answered by reference on the part of the Court to its participation in this case. In that sense, the Court's knowledge that the *ex parte* communication described by defendant did not occur was indisputably gained in its judicial capacity. Section 455, therefore, does not require recusal, and defendant's motion for disqualification must be denied.

The Court turns then to the substance of defendant's claim that under 28 U.S.C. § 2255, he should be permitted a hearing and discovery into the possibility that *ex parte* contact took place. Section 2255 provides that a federal prisoner may attack his sentence where that sentence was imposed in violation of the Constitution or law, exceeded the prescribed maximum, was assessed without jurisdiction, or is "otherwise subject to collateral attack." The provision calls for relief, for example, where a plea or sentence arose from "a fundamental defect which inher-

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nations, assign to the evidence what he believes to be its proper weight, *and to contradict the evidence with facts drawn from his own personal knowledge*) (emphasis added); *United States v. Heldt*, 668 F.2d 1238, 1271 (D.C.Cir.1981) (section 455 contemplates "some evaluation by the court of the facts giving rise to the motion. . . .") *cert. denied*, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982). This Court assumes that the Seventh Circuit's reference to "personal knowledge" is limited to personal *judicial* knowledge—and this Court has already found that its knowledge whether *ex parte* contact occurred is in fact judicial.

Turning to this evaluation, the following can be said: Defendant's allegation about the source of bias is simply not credible. It is based upon double hearsay. The primary declarant is the Court itself, which has a directly contradictory recollection of events. The secondary declarant is dead. The Government denies the conduct alleged. The affiant has no independent evidence of the truth of his claim that *ex parte* communication occurred. Nor could he, because the claim is false.

ently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." *See Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417 (1962).

By the terms of section 2255, a motion may be made at any time, however this Court need not grant a hearing where controverted factual issues can be determined by the motion itself, by the trial court's files and records, or by the district judge's personal knowledge or recollection. *See generally* 28 U.S.C. § 2255; *see also Machibroda v. United States*, 368 U.S. 487, 494-95, 82 S.Ct. 510, 513-14, 7 L.Ed.2d 473 (1962); *Virginia Islands v. Nicholas*, 759 F.2d 1073, 1077 (3d Cir.1985); *Abatino v. United States*, 750 F.2d 1442, 1444 (9th Cir.1985).

Quite obviously, the "personal knowledge" sanctioned for use by the district court on a motion under section 2255 is distinct from the "personal knowledge" which would require recusal under section 455.[5] The former is knowledge gained in a judicial capacity, and its use properly ensures that only palpably credible collateral attacks receive full-blown hearings. Indeed, "it is highly desirable that the motions be passed on by the judge who is familiar with the facts and circumstances surrounding" the case, and as a result "is not likely to be misled by false allegations as to what occurred." *Carvell v. United States*, 173 F.2d 348, 349 (4th Cir.1949).

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[5] Clearly, sections 2255 and 455 must be construed together. "It would be anomalous, indeed, having determined that the purpose of section 2255 was to permit the trial judge, because of his familiarity with the proceedings and ability *to supplement the record*, to pass upon motions thereunder, now to ascribe to Congress the intention to disqualify any judge possessing that familiarity with the proceedings from passing upon the motion. *United States v. Smith*, 337 F.2d 49, 53 (4th Cir.1964) (emphasis supplied), *cert. denied*, 381 U.S. 916, 85 S.Ct. 542, 14 L.Ed.2d 436 (1965). A district judge is not disqualified from determing a section 2255 motion precisely because his useful familiarity with the case is gained in a judicial capacity.

The Court's determination regarding the credibility of defendant's allegations in the section 455 context, *see supra* note 4, applies equally here. The claim of *ex parte* contact by the Government is based upon pure hearsay, twice over. The Court's recollection of events is in stark contradiction to that claim. While the burden falls upon defendant to prove the *ex parte* communication, *cf. Campbell v. Wainwright*, 738 F.2d 1573, 1576 (11th Cir.1984) (no evidentiary hearing required on allegation based solely on counsel's affidavit of ambiguous facts), *cert denied*, 475 U.S. 1126, 106 S.Ct. 1652, 90 L.Ed.2d 195 (1986), he offers no other evidence. It is difficult to see what a hearing would achieve, nor in any event is one justified by the bare affidavit proffered. Defendant's request for a hearing on his allegation, and ultimately to withdraw his plea on this basis and be resentenced, will therefore be denied.

## II. *The Government's Adherence to the Plea Agreement; The Voluntariness of Defendant's Plea*

By his main motion defendant claims three defects in his guilty plea and sentencing which require the withdrawal of the plea and trial. First, defendant argues that the Government breached its plea agreement with him. He asserts that the Government violated its promise not to seek a life sentence because "the entire tenor of its written and oral submissions at sentencing was a request for just such a sentence." Def.Mot. to Withdraw Plea at 1. Moreover, according to defendant, the Government failed to limit its statements to the facts and circumstances of defendant's crimes, and failed to advise the Court adequately of defendant's cooperation. The plea agreement provided for each of these promises expressly.

Second, defendant contends that the Government improperly argued, and the Court improperly found, that he had violated the plea agreement when he gave an interview to a journalist without following certain steps required by the agreement. Finally, defendant claims that

his plea came involuntarily because under the terms of the plea agreement, unless he entered a plea of guilty, his ill wife could not do so. As defendant was concerned for his wife's health and intent on avoiding a prison term for her, he argues that his plea was unlawfully compelled.

Again, the burden placed upon a defendant in a post-sentence effort to withdraw a guilty plea is a demanding one. Together, Rule 32(d) and section 2255 provide that in order to succeed, a defendant must demonstrate that a "manifest injustice" would result in allowing his plea to stand. *See United States v. Griffin*, 816 F.2d 1, 5 (D.C.Cir.1987). This "stringent standard for post sentence plea withdrawal motions is intended to prevent a defendant from testing the weight of potential punishment, and then withdrawing the plea if he finds the sentence unexpectedly severe." *United States v. McKoy*, 645 F.2d 1037, 1040 n. 3 (D.C.Cir.1981).

Because the files, records, transcripts and this Court's recollection of the challenged proceedings more than adequately answer defendant's claims, and show that no miscarriage of justice occurred, the Court finds that it must reject them as a matter of law.

**A. Plea Agreement Violations in the Government's Submissions and Allocution**

In its written agreement with defendant, the Government obligated itself as follows:

> Notwithstanding Mr. Pollard's cooperation, at the time of sentencing the government will recommend a sentence of a substantial period of incarceration and a monetary fine. The Government retains full right of allocution at all times concerning the facts and circumstances of the offenses committed by Mr. Pollard, and will be free to correct any misstatements of fact at the time of sentencing, including representations

> of the defendant and his counsel in regard to the nature and extent of Mr. Pollard's co-operation.

Plea Agreement at 3.

In addition, the Government promised to:

> bring to the Court's attention the nature, extent and value of [defendant's] cooperation and testimony . . . the Government has agreed to represent that the information Mr. Pollard has provided is of considerable value to the Government's damage assessment analysis, its investigation of this criminal case, and the enforcement of the espionage laws.

*Id.* at 4(b).

**1. *The Weinberger Declaration***

To demonstrate that the Government in fact argued for a life sentence, defendant points to unclassified portions of Secretary Weinberger's Declaration ("Weinberger Decl." or "Supp. Decl."). For example, the Declaration stated the Secretary's view that "[p]unishment, of course, must be appropriate to the crime, and in my opinion, no crime is more deserving of sever punishment than conducting espionage against one's own country." Weinberger Decl. at 45. The Secretary also reported his view that even in the "year of the spy," it was difficult for him to conceive of greater harm to the national security than that caused by defendant. Supp.Decl. at 1-2. Weinberger submitted that defendant's punishment should reflect among other things, "the magnitude of the treason committed." *Id.* at 2. Finally, the Secretary offered his opinion that defendant's loyalty to Israel transcended his loyalty to the United States. *Id.* at 3.

Defendant reads these passages as inaccurately implying he had the intent to harm the United States. Moreover, to defendant the Secretary's call for "severe" punishment "cannot be misinterpreted: the most severe punishment

appropriate for the most severe crime is the maximum sentence." Def. Mot. to Withdraw Guilty Plea at 19-20. Defendant also believes that comments upon his loyalty went beyond the facts and circumstances of his crime.

These claims are utterly without basis. The opinion that a "severe" sentence is warranted in no way means that *the* most severe sentence should be imposed. The purpose of the Secretary's Declaration was to provide the Court with his opinion of the damage to the national security done by defendant's disclosures. Whether or not defendant intended that damage, and the Court and counsel specifically noted the relevant statutory distinction, *see* Sentencing Transcript at 4, the Secretary's point was that defendant had in fact caused severe damage, and on a grand scale. His offhand use of the word "treason"—a term commonly applied by the public to individuals who violate their loyalty to the United States—does not change this fact, nor does it in any sense secretly call for a life sentence. Defendant's loyalty to Israel was directly relevant to the motivations which drove him to commit espionage, as defendant himself has admitted.

Defendant had a full opportunity to review the Weinberger Declaration, unredacted, prior to sentencing. He challenged its reliability and its veracity in a very general way, but offered nothing specific to contradict it, though the Court noted and counsel agreed that defendant himself was quite able to assess the technical aspects of the Declaration. Defendant merely claimed the document was "speculative", "seriously flawed" and exaggerated. It simply cannot be said that the Weinberger Declaration served to end-run the Government's promise to request merely a "substantial," rather than a life sentence. The phrase defendant seizes upon do precisely what the Government agreed to do: argue for a substantial term of imprisonment, and no more.

### 2. *The Government's Allocution and the Facts and Circumstances of Defendant's Crimes*

The Government limited itself so as only to permit discussion of to the facts and circumstances of defendant's crimes. Defendant asserts that the Government's explanation of its view of defendant's motive, and conclusions that he lacked remorse and exhibited a deceptive and arrogant nature, violated the agreement, and implied that he should receive a life sentence. Defendant relies primarily on *United States v. Moscahlaidis*, 868 F.2d 1357 (3d Cir.1989). In *Moscahlaidis*, the Government had agreed not to seek any custodial sentence at all. The Third Circuit found a violation of this promise when the Government discussed Moscahlaidis' "greed," "moral bankruptcy," and "utter contempt" for his fellow man. This case is inapposite. The Government here did not agree not to take any position at all; rather, it announced its intention to seek a severe sentence. Other cases cited by defendant are similarly distinguishable. *See United States v. Crusco*, 536 F.2d 21 (3d Cir.1976) (Government promise to take no sentencing position); *United States v. Cook*, 668 F.2d 317 (7th Cir.1982) (promise to take no sentencing position or to provide material in aggravation).

Moreover, motive and character, insofar as they place defendant's conduct in some context and assist in the sentencing decision, are facts and circumstances of defendant's crimes, and are directly relevant to the Court's task at sentencing. *See, e.g.*, 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.") The Court finds that the Government's allocution and pleadings did not violate the plea agreement's requirement that it limit itself to the facts and circumstances of defendant's crimes.

### 3. *Adequacy of the Government's Comments About Defendant's Cooperation*

Defendant also contends that the Government's comments about his cooperation were inadequate to satisfy its obligations under the agreement. Again, he asserts that these comments constituted a poorly hidden attempt to secure a life sentence. In fact, defendant simply disagrees with the Government's assessment of his cooperation, as he made clear at the time of sentencing. The Government reported defendant's cooperation in the plea agreement itself, in its first Memorandum in Aid of Sentencing and its Classified Sentencing Memorandum. These materials explained in some detail the manner, extent and value of defendant's efforts.

In any event, prior to sentencing the Court and the parties addressed this very issue.[6] Defendant made no further objection on the question. His argument, freshly posed, is no more persuasive now. Defendant claims that by "casting aspersions" on defendant's cooperation, the Government completely undercut the statements it made earlier. For example, the Government noted that defendant's delay in cooperating allowed certain co-conspirators to flee the United States. It was no violation of the plea agreement

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[6] *See* Sentencing Transcript at 63:

THE COURT: [To counsel for the Government] Do you want to address what Mr. Hibey [defendant's counsel] has suggested, that nowhere in the Government's allocution has there been any honest attempt by the Government to indicate any value in Mr. Pollard's post-plea efforts?

MR. LEEPER: I will address that in about ten words, your honor. It was in the very first pleading we filed, your honor.

THE COURT: I though it was.

MR. LEEPER: It was in the classified version of the pleading that we filed with your honor, called the Government's Classified Sentencing Memorandum. I believe it was filed on the 9th of January. But I have nothing further, your honor.

THE COURT: Does that refresh your recollection, Mr. Hibey?

MR. HIBEY: Yes sir.

for the Government to explain the positive value of the cooperation in one sense (damage assessment), while also noting that defendant had frustrated Government efforts in another sense (law enforcement). The record in this case does not support the contention that the Government failed in its obligation. It did not dryly recite in a few declarative sentence that defendant had cooperated. It did much more, as it had said it would. In short, the Government kept its promise.

**B. Government's Comments About Defendant's Media Interview**

Next, defendant complains that the Government discussion of his prison interview with a journalist following his guilty plea also constituted a breach of the plea agreement. He argues that if the interview violated the plea agreement, he was entitled to a formal hearing and findings. To defendant, the Government comments again reflected its effort to persuade the Court to impose a life sentence, violated due process and themselves constituted a breach of the plea agreement.

This argument can be disposed of easily. In the plea agreement, defendant was bound as follows:

> Should Mr. Pollard at any time author any book or other writing, or otherwise provide information for the purposes of publication, he hereby agrees to first submit said book, writing or information to the Director of Naval Intelligence for pre-publication review and deletion of information, which, in the sole discretion of the Director of Naval Intelligence, is or should be classified.

Plea Agreement at 9. Defendant gave the interview without clearing or submitting to Naval Intelligence any of the information he discussed with the reporter.

Defendant characterizes the Government's discussion at sentencing as alleging that he disclosed classified infor-

mation to the reporter in violation of the agreement. At the hearing, the Court made clear that it understood the Government's argument differently: that the mere *fact* of the interview revealed defendant's view that his assessment of what could or could not be disclosed should control. *See* Sentencing Transcript at 60. The episode also was relevant to defendant's veracity. These were certainly factors the Court could consider in imposing sentence. Defendant's counsel contested the idea that the interview revealed classified information, but he agreed fully with the Court that defendant had utterly failed to comply procedurally with the provision quoted above. There was no factual dispute whatsoever in that regard.[7] The Government's allocution on this point did not breach the plea agreement.

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[7] The following colloquy at sentencing about the interview is self-explanatory. Defendant did not dispute that he had violated the procedural requirements to which he had bound himself:

> THE COURT: You just take the position that there was nothing wrong with it?
>
> MR. HIBEY: No, I am not saying that. The whole action was ill-advised, unauthorized, there is no question about that in my mind. What I am still trying to point out is the fact that the information was unclassified.
>
> THE COURT: And all the Government is arguing is that that is consistent with his view that it is his determination on all these things that controls and not anybody else's, even when he is before the Court. That is all the Government was trying to say, for sure, but they can say it better than I can. But that is the thrust of the argument, as I understood it. Didn't you understand it that way?
>
> MR. HIBEY: No.
>
> THE COURT: All right.
>
> MR. HIBEY: That is the only reason why I took issue with it. But as the Court has stated it, I obviously and will not recede from your interpretation of it.
>
> THE COURT: Oh, feel free.
>
> MR. HIBEY: No, No, No. I am saying this because you are correct in your interpretation * * * My argument is, he didn't [give classified information]. But, yes, your honor, you are correct, that it was done without the preclearance procedure.

**C. The Voluntariness of Defendant's Plea**

Defendant claims that his plea was involuntary, since it was "wired" to that of his wife, and that this fact, coupled with the Court's failure at sentencing to directly inquire whether his plea was voluntary, mandates withdrawal. Assuming without deciding that these claims are timely, both must fail. First, although the Supreme Court had reserved judgment on prosecutorial promises of lenient or adverse treatment of third parties in plea negotiations, *see Bordenkircher v. Hayes*, 434 U.S. 357, 364 n. 8, 98 S.Ct. 663, 668 n. 8, 54 L.Ed.2d 604 (1978), the Circuits addressing the issue have approved such arrangements. In *Politte v. United States*, 852 F.2d 924, 930 (7th Cir.1988), the court specifically held "that a good faith prosecution of a third party, coupled with a plea agreement which provides for a recommendation of a lenient sentence for that third party, cannot form the basis of a claim of coercion by a defendant seeking to show that a plea was involuntarily made." *See also Bontkowski v. United States*, 850 F.2d 306, 313 (7th Cir.1988) (threat of prosecution of wife, previously indicted, "cannot support a claim of coercion"); *Harman v. Mohn*, 683 F.2d 834, 837 (4th Cir.1982) (same); *United States v. Nuckols*, 606 F.2d 566, 569 (5th Cir.1979) (same; "As a threshold matter, we see no constitutional infirmity in broadening plea negotiations so as to include third party beneficiaries.").

By the same token, the Court's failure specifically to inquire of defendant by rote whether his plea was voluntary neither is cognizable under section 2255 nor constitutes a "fundamental defect which inherently results in a complete miscarriage of justice." *See Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417 (1962). Rule 11 provides that the Court "shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary. . . ." Fed.R.Crim.Pro. 11(d). In *United States v. Timmreck*, 441 U.S. 780, 99 S.Ct.

2085, 60 L.Ed.2d 634 (1979), the Supreme Court held that technical violations of Rule 11 are "neither constitutional nor jurisdictional," and foreclosed relief on such complaints under section 2255 altogether. *Id.* at 784, 99 S.Ct. at 2087.

Even assuming that the plea agreement provision dealing with defendant's wife created a sufficiently "aggravating circumstance" to avoid this initial hurdle, *see id.* at 785, 99 S.Ct. at 2088, no manifest injustice occurred at the sentencing hearing in this case, and no section 2255 relief obtains. The Court satisfactorily determined that the plea was voluntary through a series of questions addressed to defendant and his counsel, including inquiries regarding defendant's understanding of the charge and its consequence, his rights at trial, and the extent to which defendant had discussed all aspects of his actions with his attorney. Defendant's counsel then volunteered that defendant came before the Court "knowingly, and voluntarily enters his plea." Transcript of Plea Proceedings at 7. Shortly thereafter, the Court pointedly inquired of defendant: "Do you know of any reason that I shouldn't accept your plea?" He responded: "No sir, I don't." *Id.* at 8.

This exchange in open court unquestionably satisfied Rule 11. The Court's questioning of defendant and his counsel formed a perfectly adequate basis for the Court's determination that the plea came voluntarily. Defendant was provided ample opportunity to bring his claimed misgivings to light. Instead, he persuaded the Court that he understood the consequences of his actions, and faced them willingly. The Rule requires nothing more.

The Government lived up to its obligations under the plea agreement. It refrained from advocating a life sentence, limited its allocution to the facts and circumstances of defendant's crimes and adequately advised the Court of defendant's cooperation. The Government's discussion of defendant's failure to comply with the plea agreement in

granting a media interview, as the Court understood it, was directly relevant to sentencing. Lastly, the provision for joint pleas by defendant and his wife did not render defendant's plea involuntary, and the Court adequately determined the voluntariness of that plea as required by Rule 11. Defendant's motion to withdraw Guilty Plea will therefore be denied.

## III. Defendant's Motion for Access to the Classified Weinberger Declaration

On the assumption that classified portions of the Weinberger Declaration would bolster defendant's claim that the Declaration implicitly argued for a life sentence, defendant's newly-retained counsel received a security clearance and sought access to the document as well as other classified sentencing memoranda. The Government resisted, and defendant filed a motion for an order permitting him to review it. The Court holds that the materials need not be provided to defendant's counsel to assist his section 2255 effort.

There are analogous cases dealing with requests for access to presentence reports to support motions to reduce sentence. In *United States v. Lewis*, 743 F.2d 1127 (5th Cir.1984), the Fifth Circuit upheld the District Court's refusal to allow access to a presentence report, citing a number of factors: (1) the defendant "alleged no facts to show that the sentence was a gross abuse of discretion"—his claims were "wholly conclusory;" (2) lack of access did not prevent his counsel from presenting the information contained in the presentence report—defendant's background and record; (3) "Furthermore, [defendant] himself has read the report, and he and his prior counsel commented upon it at sentencing"—there was no allegation that prior counsel was unavailable or incompetent, or that defendant did not remember or understand the report. According to the court in *Lewis*, refusal to supply the report post-sentence was no due process or Sixth Amend-

ment violation. *Id.* at 1129. Similarly, *United States v. Vernstein*, 546 F.2d 109, 110 (5th Cir.1977) held that it was no error to withhold a presentence report from new counsel seeking a Rule 35 reduction in sentence. *See also United States v. Buckley*, 847 F.2d 991, 1003 (1st Cir.1988), *cert. denied*, 488 U.S. 1015, 109 S.Ct. 808, 102 L.Ed.2d 798 (1989).

Each of the factors identified in *Lewis* apply with some force here. As pointed out in section II.A, *supra*, defendant's claims of exaggeration and inaccuracy in the unclassified portion of the Weinberger Declaration simply do not withstand scrutiny. The sentence here was well within the Court's discretion. Defendant's current counsel has access both to defendant and, presumably, prior counsel and his files. More importantly, defendant's previous attorney, who was quite competent, commented extensively on the Weinberger Declaration and other classified submissions. There is no allegation that either defendant or prior counsel cannot recall the substance of these materials.

Defendants attempts to distinguish this line of cases by casting the Declaration in particular as a "pleading," to which he believes he should be given automatic access. The prosecution did not prepare the Declaration; instead, the Secretary of Defense prepared it. While the Secretary may not have been neutral and detached, his submission is analogous to a presentence report. Both types of material are evidentiary in nature and designed to assist the Court in sentencing by providing context for a given crime which at points is unavoidably subjective. Moreover, defendant's claim to other classified sentencing material relies completely on perceived exaggeration and inaccuracy in the Weinberger Declaration. This perception is totally unfounded and defendant has made no showing to justify access to these sensitive documents.

Defendant's Motion for Access to Materials Presented at Sentencing will be denied.

An appropriate Order accompanies this Memorandum.

**ORDER**

Upon consideration of Defendant's Motion to Recuse the Court under 28 U.S.C. § 455, Motion to Withdraw Guilty Plea, Supplemental Memorandum in Support of Motion to Withdraw Guilty Plea and Motion for Access to Materials Presented at Sentencing, the Government's opposition thereto and the entire record in this matter, and in accordance with the Memorandum entered this date, it is by the Court this 10th day of September, 1990,

ORDERED, that Defendant's Supplemental Memorandum in Support of Motion to Withdraw Guilty Plea, and related pleadings, and Defendant's Motion to Recuse the Court under 28 U.S.C. § 455 and related pleadings, be and hereby are UNSEALED, and the Clerk shall file them on the public record; and it is

FURTHER ORDERED, that Defendant's Motion to Recuse the Court under 28 U.S.C. § 455 be and hereby is DENIED; and it is

FURTHER ORDERED, that Defendant's Motion to Withdraw Guilty Plea be and hereby is DENIED; and it is

FURTHER ORDERED, that Defendant's Motion for Access to Materials Presented at Sentencing be and hereby is DENIED.

## APPENDIX C

### Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### 18 U.S.C. § 794

**Gathering or delivering defense information to aid foreign government**

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers,

description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

28 U.S.C. § 2255

**Federal custody; remedies on motion attacking sentence**

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that

the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

## APPENDIX D

**U.S. Department of Justice**
**United States Attorney**
***District of Columbia***

***Judiciary Center Operations***
***555 Fourth St. N.W.***
***Washington, D.C. 20001***

***May 23, 1986***

Richard A. Hibey, Esquire
1708 New Hampshire Avenue, N.W.
Washington, D.C. 20009

Re: United States v. Jonathan Jay Pollard
Criminal Case No. 85-778M

Dear Mr. Hibey:

As a result of recent meetings attended by yourself, Assistant United States Attorneys of this office, and several other representatives of the Department of Justice, we understand that Jonathan Pollard wishes to dispose of the criminal charges in the above-captioned case with a plea of guilty. It has been, and is the position of the United States that Mr. Pollard must plead guilty to Conspiracy to Deliver National Defense Information to a Foreign Government (18 U.S.C. § 794 (c)), which offense carries a maximum penalty of life imprisonment and a fine of $250,000. You have stated, on behalf of Mr. Pollard, that he is willing to enter a plea of guilty to this charge. Furthermore, while we continued to discuss the terms and conditions of this plea agreement, Mr. Pollard agreed to immediately commence cooperation with the Government attorneys and agents conducting the criminal investigation, and with the agents involved in assessing the damage to the national security resulting from Mr. Pollard's commission of this offense.

Several interviews of Mr. Pollard followed, conducted in your presence by Government attorneys and agents of the Federal Bureau of Investigation. During those interviews, Mr. Pollard revealed the details of his espionage activities on behalf of the government of Israel, including the specific classified documents and information requested by his co-conspirators; the means by which he acquired classified documents and information for his co-conspirators; the nature and extent of classified information compromised; and the nature and amount of the compensation which Mr. Pollard receive for his espionage activities. It should also be noted that the veracity of the foregoing information was confirmed through independant investigation and several polygraph examinations of Mr. Pollard which you authorized agents of the Federal Bureau of Investigation to perform.

In consideration of Mr. Pollard's entry of a plea of guilty, and the cooperation which he has provided and will continue to provide, the United States is prepared to dispose of the above-captioned criminal case on the following terms and conditions:

1. Mr. Pollard will plead guilty to a one (1) count Indictment, which charges him with Conspiracy to Deliver National Defense Information to a Foreign Government in violation of 18 U.S.C. § 794(c). As noted above, the maximum penalty for this is life imprisonment and a fine of $250,000. The Court is also required to assess the amount of $50.00 against a defendant for each felony count to which he pleads guilty, pursuant to 18 U.S.C. § 3013.

2. This plea agreement is entered into pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure. Mr. Pollard admits that he is, in fact, guilty of the offense set forth in the Indictment.

3. Mr. Pollard agrees to cooperate with the Government on the following terms and conditions:

(a) Mr. Pollard shall, upon execution of this agreement and prior to entry of his plea, submit to further interviews by Government attorneys and/or agents assisting the attorneys, submit to polygraph examinations as requested by the Government, and testify before the Grand Jury investigating this criminal offense. Mr. Pollard's failure to be truthful in interviews or testimony or his knowingly withholding of information will nullify this plea agreement. Mr. Pollard shall also submit to such further interviews and/or polygraph examinations as are requested by the government after entry of his plea and/or imposition of sentence.

(b) Mr. Pollard shall fully and truthfully respond to all questions put to him by federal law enforcement authorities and other federal government officials. Specifically, he shall fully and truthfully disclose to the Government everything he knows about espionage and espionage related activities, the nature and extent of classified information compromised and about any other matters as to which the Government may choose to inquire. He shall promptly turn over to the Government any property, documents or information in his possession or subject to his control that are in any way related to any such matters.

(c) Mr. Pollard shall cooperate completely with federal law enforcement authorities and other federal government officials in any matter as to which his cooperation may be sought. He shall comply with any and all reasonable requests from such authorities with respect to the specific assistance that he shall provide.

(d) Mr. Pollard shall, upon request of the Government, submit to any additional polygraph examination by the Government polygraphers.

(e) Mr. Pollard shall testify fully and truthfully during any grand jury, trial or other proceeding in which his testimony is determined by the Government to be relevant.

4. In return for the complete fulfillment by Mr. Pollard of all of his obligations under this agreement, the Government agrees as follows:

(a) When he appears before the Court for sentencing for the offense to which he has agreed to plead guilty, the Government will bring to the Court's attention the nature, extent and value of his cooperation and testimony. Because of the classified nature of the information Mr. Pollard has provided to the Government, it is understood that particular representations concerning his cooperation may have to be made to the Court *in camera*. In general, however, the Government has agreed to represent that the information Mr. Pollard has provided is of considerable value to the Government's damage assessment analysis, its investigation of this criminal case, and the enforcement of the espionage laws.

(b) Notwithstanding Mr. Pollard's cooperation, at the time of sentencing the Government will recommend that the Court impose a sentence of a substantial period of incarceration and a monetary fine. The Government retains full right of allocution at all times concerning the facts and circumstances of the offenses committed by Mr. Pollard, and will be free to correct any misstatements of fact at the time of sentencing, including representations of the defendant and his counsel in regard to the nature and extent of Mr. Pollard's cooperation. Moreover, Mr. Pollard understands that, while the Court may take his cooperation into account in determining whether or not to impose a sentence of life imprisonment, this agreement cannot and does not limit the court's discretion to impose the maximum sentence.

(c) The Government also agrees to make known to the Court, should Mr. Pollard file a motion to Reduce Sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure, and/or to the Parole Commission, the nature, extent and value of Mr. Pollard's testimony and

continued cooperation. However, the Government retains full right of allocution in connection with any Rule 35 motion, and/or proceedings before the Parole Commission.

(d) Other than the offense to which Mr. Pollard has agreed to plead guilty, he will not be charged with any other violations of federal criminal law for his involvement in espionage or espionage-related activities which occurred prior to the date of this agreement.

(e) Pursuant to Rule 11(e)(1)(B), Federal Rules of Criminal Procedure, the Government will enter into a plea agreement with the defendant's wife, Anne Henderson Pollard. That agreement is contained in a letter to Mr. James F. Hibey dated May 23, 1986, a copy of which is attached.

5. If Mr. Pollard should fail in any way to fulfill completely each and every one of his obligations under this agreement, then the Government will be released from its commitment to honor any and all of its obligations to him. Thus, for example, if at any time after execution of this agreement Mr. Pollard should fail to cooperate as required, knowingly withhold evidence or information from the Government, or otherwise not be completely truthful with the Government during interviews or in his testimony, then the Government will be free to (i) prosecute him for espionage, perjury, false declaration, false statement and/or obstruction of justice; (ii) prosecute him for other offenses, if any, that he has committed; (iii) use against him in all of those prosecutions the information and documents that he himself has disclosed to the Government during the course of his cooperation; and (iv) recommend to the Court any sentence that the Government considers appropriate, up to and including the maximum possible sentence.

6. Nothing in this agreement shall be construed to protect Mr. Pollard in any way from prosecution for perjury, false declaration or false statement, in violation of 18 U.S.C. §§ 1621, 1623 or 1001, obstruction of justice in violation of 18 U.S.C. §§ 1503, 1505, 1510, 1512, or 1513,

or any other offense committed by him after the date of this agreement. The information and documents that he discloses to the Government pursuant to this agreement may be used against him in any such prosecutions.

6. Nothing in this agreement shall be construed to protect Mr. Pollard in any way from prosecution for perjury, false declaration or false statement, in violation of 18 U.S.C. §§ 1621, 1623 or 1001, obstruction of justice in violation of 18 U.S.C. §§ 1503, 1505, 1510, 1512, or 1513, or any other offense committed by him after the date of this agreement. The information and documents that he discloses to the Government pursuant to this agreement may be used against him in any such prosecutions.

7. If Mrs. Anne Henderson Pollard fails to completely fulfill all of her obligations pursuant to her plea agreement, at any time before both she and Mr. Pollard have been sentenced, then the Government will be relieved of its obligations under this plea agreement with Mr. Pollard.

8. Mr. Pollard waives and agrees to waive any rights under the Speedy Trial Act, and he understands that his sentencing may be delayed at the Government's request until his cooperation has been completed.

9. Mr. Pollard understands and acknowledges his legal obligation to refrain from the unauthorized disclosure, either orally or in any writing, of classified information derived during his employment by the United States Navy and/or in the course of the activities which resulted in his arrest in the above-captioned case. Should Mr. Pollard at any time author any book or other writing, or otherwise provide information for purposes of publication or dissemination, he hereby agrees to first submit said book, writing or information to the Director of Naval Intelligence for pre-publication review and deletion of information which, in the sole discretion of the Director of Naval Intelligence, is or should be classified. Furthermore, at the time of his acceptance of the instant plea offer, Mr. Pollard agrees

to execute an Assignment to the United States of any profits or proceeds which may be obtained by, or become payable to, Mr. Pollard in connection with any publication or dissemination describing his employment by the United States Navy, his espionage activities on behalf of the government of Israel, or the facts and circumstances leading to his arrest in this criminal case. The Assignment is attached hereto as Exhibit A, and is incorporated herein by reference.

10. There are no other agreements, promises, undertakings or understandings between Mr. Pollard and the Government other than those set forth in this agreement.

Very truly yours,

/s/ J.E. diGenova
JOSEPH E. diGENOVA
United States Attorney

/s/ Stephen R. Spivak
STEPHEN R. SPIVAK
Assistant United States Attorney

/s/ Charles S. Leeper
CHARLES S. LEEPER
Assistant United States Attorney

/s/ David F. Geneson
DAVID F. GENESON
Assistant United States Attorney

I have read this agreement and carefully reviewed every part of it with my attorney. I understand it and I voluntarily agree to it.

Date: 5-29-86 /s/ Jonathan Jay Pollard
Jonathan Jay Pollard

I am Mr. Pollard's attorney. I have carefully reviewed

every part of this agreement with him. To my knowledge, his decision to enter into this agreement is an informed and voluntary one.

Date: 6-4-86 /s/ Richard A. Hibey
Richard A. Hibey, Esquire
Attorney for Jonathan Jay Pollard

## APPENDIX E

**U.S. Department of Justice**
**United States Attorney**
***District of Columbia***

***Judiciary Center Operations***
***555 Fourth St. N.W.***
***Washington, D.C. 20001***

***May 23, 1986***

James F. Hibey, Esquire
Suite 100
1660 L Street, N.W.
Washington, D.C. 20036

Re: United States v. Anne Henderson Pollard
Criminal Case No. 85-795M

Dear Mr. Hibey:

As a result of recent meetings attended by yourself, Assistant United States Attorneys of this office, and several other representatives of the Department of Justice, we understand that Anne Henderson Pollard wishes to dispose of the criminal charges in the above-captioned case with a plea of guilty prior to an indictment by the grand jury.

* * * * * * *

4. In return for the complete fulfillment by Mrs. Pollard of all of her obligations under this agreement, the Government agrees as follows:

* * * * * * *

(b) The Government retains full right of allocution at all times, including the right to detail the facts and circumstances of the offenses committed by Mrs. Pollard, and to correct any misstatements of fact, including represen-

tations of the defendant and her counsel, in regard to the nature and extent of Mrs. Pollard's cooperation. However, at the time of sentencing, the Government will not oppose the imposition of concurrent sentences on the two counts to which Mrs. Pollard pleads guilty. Mrs. Pollard understands that, while the Court may take her cooperation into account in determining whether or not to impose the maximum sentences for these offenses, this agreement cannot and does not limit the Court's discretion in sentencing, including the discretion to impose consecutive sentences.

* * * * * * *

(e) Pursuant to Rule 11(e)(1)(B), Federal Rules of Criminal Procedure, the Government will enter into a plea agreement with the defendant's husband, Jonathan Jay Pollard. That agreement is contained in a letter to Mr. Richard A. Hibey dated May 20, 1986, a copy of which is attached.

* * * * * * *

7. If Mr. Jonathan Jay Pollard fails to completely fulfill all of his obligations pursuant to his plea agreement, at any time before both he and Mrs. Pollard have been sentenced, then the Government will be relieved of its obligations under this plea agreement with Mrs. Pollard.

* * * * * * *

Very truly yours,

/s/ J.E. diGENOVA
JOSEPH E. diGENOVA
United States Attorney

/s/ Stephen R. Spivack
STEPHEN R. SPIVACK
Assistant United States Attorney

/s/ Charles S. Leeper
CHARLES S. LEEPER
Assistant United States Attorney

/s/ David F. Geneson
DAVID F. GENESON
Assistant United States Attorney

I have read this agreement and carefully reviewed every part of it with my attorney. I understand it and I voluntarily agree to it.

Date: 5-29-86 /s/ Anne Henderson Pollard
Anne Henderson Pollard

I am Mrs. Pollard's attorney. I have carefully reviewed every part of this agreement with her. To my knowledge, her decision to enter into this agreement is an informed and voluntary one.

Date: 5-29-86 /s/ James F. Hibey
James F. Hibey, Esquire
Attorney for Anne Henderson Pollard

## APPENDIX F

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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**Criminal No. 86-0207**

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UNITED STATES OF AMERICA

v.

JONATHAN JAY POLLARD

## GOVERNMENT'S MEMORANDUM IN AID OF SENTENCING

* * * * * * *

### III. THE PLEA AGREEMENT—DEFENDANT'S VERSION OF THE CONSPIRACY

#### a. The Terms of the Plea Agreement

Beginning in January, 1986, defendant, through his counsel, engaged in plea discussions with the undersigned government counsel and attorneys for the Department of Justice. Certain preliminary conditions were required by the government. Defendant was to submit to interviews by the undersigned government counsel and the FBI. Following these interviews, defendant was to submit to polygraph examinations by the FBI. Only after these preliminary conditions were satisfied was a plea offer extended to defendant. These conditions were agreed to by defendant, and at the conclusion of the interviews and polygraph examinations, a plea offer was extended to and accepted by defendant. The principal terms of the plea offer can be summarized as follows:

1. Defendant must enter a plea of guilty to the charge of Conspiracy to Commit Espionage, in violation of 18 U.S.C. § 794(c), carrying a maximum sentence of imprisonment for any term of years or for life, and a $250,000 fine;

2. Defendant must submit to damage assessment debriefings by any military and intelligence community representatives, and such additional polygraph examinations as are deemed necessary by those representatives;

3. Defendant must testify during any grand jury, trial on other proceedings at which his testimony may be relevant concerning his espionage activities and those of his co-conspirators;

4. Defendant must submit to the Director of Naval Intelligence all information he may intend to provide in interviews, articles, books or any other public disseminations for pre-publication review in order to prevent further disclosure of classified information;

5. Defendant must execute an assignment to the United States of any profits, proceeds or interest he may receive for interviews, articles, books or other public disseminations by, or about him;

6. Defendant must acknowledge that the Court is free to sentence him to the maximum term of imprisonment and fine; that the government is obliged only to inform the Court of the nature, extent and value of defendant's cooperation; and that notwithstanding the value of defendant's cooperation, the government would nonetheless recommend that the Court impose a sentence of substantial incarceration and a monetary fine;

7. Defendant must acknowledge that if he fails to cooperate fully with the government or otherwise fails to fulfill his obligations, the plea agreement is null and void.

* * * * * *

## IV. FACTORS COMPELLING SUBSTANTIAL SENTENCE

In the foregoing sections of this memorandum, the government has set forth in substantial detail the facts and circumstances surrounding defendant's espionage activities. The length of this factual statement reflects the government's view that this is a case wherein the facts are so compelling as to warrant, *vel non*, the imposition of a substantial period of incarceration and a monetary fine. These facts reveal an espionage operation which was in existence for over eighteen months, during which defendant compromised thousands of pages of classified documents, a substantial number of which contained TOP SECRET and SCI information. But for the intervention of FBI and NIS agents, defendant and his co-conspirators contemplated that the compromise of classified information would have continued at this rate for another nine years.

Defendant's espionage activities on behalf of Israel constituted a flagrant breach of the trust conferred by the United States upon a select group of government employees who hold security clearances to access the most sensitive of our nations military secrets. This breach of trust is all the more venal in that, despite the expected protestations of defendant to the contrary (see p.39, *infra*), it is clear that the money and gifts provided by the Israelis were significant, if not the primary factors motivating defendant in his espionage activities. In short, the evidence establishes that, in exchange for substantial sums of money, paid as well as promised, defendant wrought damage to the national security which was exceptional in both its volume and scope.

In an effort to offset this overwhelming evidence, defendant will undoubtedly urge the Court also to consider his post-arrest conduct, i.e., defendant's submission of a plea of guilty and his cooperation with the government's ongoing espionage investigation. The entry of a guilty plea, and post-plea cooperation with law enforcement authorities, are traditional factors which may be considered by courts at the time of sentencing. *See, e.g., ABA Standards, Pleas of Guilty,* § 1.8 (1979). It is in recognition of this fact that, after defendant agreed to submit to interviews by government counsel and polygraph examinations by the FBI, the government formulated a plea offer in this case and agreed to make known the nature, extent and value of defendant's cooperation.

The defendant has submitted to numerous post-plea debriefings conducted by law enforcement agents and representtives of the intelligence community. During those debriefings, defendant revealed a substantial amount of information regarding the formation, conduct and extent of the espionage operation which was previously unknown to the government. For this reason, defendant's post-plea cooperation has proven to be of considerable value to the government's damage assessment analysis, and the ongoing investigation of the instant case.

In the final analysis, it is for the Court to determine the weight which should be given to defendant's post-plea cooperation. The government acknowledges that defendant has been candid and informative in describing his wrongdoing, and that it has derived benefit from the information defendant has provided. However, in deciding whether defendant's cooperation warrants sentencing consideration, it is also appropriate for the Court to evaluate the extent to which "the defendant has given or offered cooperation [and if] such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct." *ABA Standards, Pleas of Guilty,* § 1.8(a)(iv)(1979). In this regard, it must

be noted that three of defendant's Israeli co-conspirators were able to flee beyond the reach of United States law enforcement because, in the three days prior to his arrest, defendant chose to mislead the FBI/NIS agents as to the identity of defendant's co-conspirators. Thus, it cannot be said at this time that defendant's cooperation is likely to result in the successful prosecution of other, equally culpable offenders.

Moreover, there remains the very substantial question of defendant's motivation—whether defendant's cooperation has been proffered because of genuine remorse, or merely pursued out of self-interest, as a hedge against imposition of a severe sentence. It has been recognized that sentencing consideration is appropriate for a defendant who has entered a guilty plea where "the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct." *ABA Standards, Pleas of Guilty,* § 1.8(a)(1)(1979).

In this regard, the government asks the Court to weigh the following factors. First, defendant has expressed no remorse during the post-plea debriefings conducted by government counsel and investigators; in fact early in the debriefing process defendant informed two FBI agents that he would do it all again if given the chance. Second, from the outset of the conspiracy defendant was assured by his Israeli co-conspirators that the latter would be "contained" if defendant was apprehended. It is certainly reasonable to infer that defendant, even on the day of his arrest, persisted in his refusal to identify either the foreign nation on whose behalf he had been acting or his individual co-conspirators, in the hope that his continuing loyalty to Israel would be rewarded by efforts to free him. Third, defendant has repeatedly expressed resentment at being "abandoned" by his Israeli co-conspirators, in connection with his unsuccessful attempt to gain asylum, as well as after defendant's arrest. It may well be defendant will concede that, in the absence of the assistance that his co-

conspirators—in particular Rafi Eitan—had promised, he chose to cooperate fully with the U.S. government in an effort to reduce the likelihood that the maximum sentence will be imposed. Such a candid assessment would, it is submitted, be more consistent with the factors listed hereinabove, than an exaggerated claim of remorse for his espionage activities.

While post-plea cooperation concededly is a relevant sentencing factor, certain other exculpatory arguments have been advanced by defendant that, in the government's view, are self-serving and without evidentiary support. First, defendant has publicly proclaimed that his espionage activities were motivated, not by the prospect of financial gain, but rather by his desire to aid Israel in the fight against terrorism. Second, defendant has contended that he is entitled to a more lenient sentence because his disclosure of classified information to an ally was less damaging than in cases where espionage has been committed on behalf of a communist country. For the reasons set forth hereinbelow, the government submits that both of these arguments should be summarily rejected by the Court.

With respect to defendant's claim that he was motivated by altruism rather than greed, a number of articulable facts demonstrate that this claim is superficial rather than substantial. Initially, it must be recognized that defendant's espionage relationship with the Israelis is not the only instance where defendant has disclosed classified information in anticipation of financial gain. The government's investigation has revealed that defendant provided to certain of his social acquaintances U.S. classified documents which defendant obtained through U.S. Navy sources. The classified documents which defendant disclosed to two such acquaintances, both of whom are professional investment advisers, contained classified economic and political analyses which defendant believed would help his acquaintances render investment advice to their clients. Defendants

also gave classified information to a third social acquaintance who defendant also knew would utilize it to further the acquaintance's career.

Defendant has acknowledged that, although he was not paid for his unauthorized disclosures of classified information to the above-mentioned acquaintances, he hoped to be rewarded ultimately through business opportunities that these individuals could arrange for defendant when he eventually left his position with the U.S. Navy. In fact, defendant was involved in an ongoing business venture with two of these acquaintances at the time he provided the classified information to them.

Unlike the prospective business opportunities presented by his social acquaintances, defendant's espionage relationship with the Israelis provided the opportunity for immediate financial gain. The evidence reveals that from the very outset of his relations with his Israeli co-conspirators, defendant was enamored of the prospect for monetary gain. For example, when in the summer of 1984 he attempted to recruit a friend to assist him in delivering information to the Israelis (see p. 21, *supra*), defendant touted the opportunity for financial reward in return for delivery of information to the Israelis. In the earliest meetings with Aviem Sella, the necessity of a "salary" for defendant was discussed. During the meetings in Paris in November, 1984, the amount of defendant's monthly "salary" was the sub ject of arms-length negotiation between defendant, and Aviem Sella, Rafi Eitan and Joseph Yagur. In several of the earlier meetings with his co-conspirators, defendant also actively participated in developing a cover story to disguise the true source of these additional monies.

By defendant's own admission made during his post-plea debriefings, at no time did defendant resist or refuse Israeli offers to pay him for U.S. classified information. Moreover, as the operation progressed, defendant actively sought increases in the compensation he was to be paid.

Only a few months after the Paris meetings, it was defendant who prompted the payment of additional compensation by emphasizing for Yagur the quality of the information defendant had provided. When Yagur asked defendant what salary increase would be necessary, defendant told Yagur to "up it by a thousand. As a result of these discussions, defendant's monthly salary increased to twenty-five hundred dollars ($2500).

In the summer of 1985, defendant raised the spectre of detection by U.S. authorities to obtain additional money. During his meetings in Israel with Eitan, defendant repeatedly expressed concern that he was going to be caught. In direct response to this apparent negotiating tactic, defendant was given additional cash in Israel and promised the substantial annual payments into a foreign bank account. Defendant will no doubt insist that the Israelis, not defendant, conceived of the foreign bank account and the additional sums of money to be deposited therein. At the same time, defendant cannot dispute that he willingly accepted the additional compensation and, upon his return to the United States, defendant redoubled his efforts by increasing the volume of classified documents he delivered to the Israelis.

By the summer of 1985, the evidence shows that defendant had become literally addicted to the high lifestyle funded by his espionage activities. As previously noted, the checking account disbursements made by defendant and his wife consumed defendant's Navy salary and Anne Henderson Pollard's public relations income. In addition, the government has identified cash expenditures by defendant and his wife, funded by defendant's espionage activities, which equalled the Pollard's legitimate salaries. It was during the summer of 1985 that defendant and Anne Henderson Pollard acquired a number of items of expensive jewelry in Israel as well as here in the United States (see p. 18, 19-20, *supra*). Also illustrative are the accommodations which defendant arranged for himself and

Anne Henderson Pollard during their travel abroad that summer. According to the travel agency which booked the travel accommodations, in each of the seven major cities visited during that three week trip defendant insisted that reservations be made only at certain first-class hotels. Moreover, in order to travel from Venice to Zurich in August, 1985, defendant obtained a private compartment on the Orient Express at a rate of more than seven hundred dollars ($700).

At the time of his apprehension, defendant had already received, in hand, approximately fifty thousand dollars ($50,000) in cash for his espionage activities. Moreover, he understood that another thirty thousand dollars ($30,000) had been deposited in his foreign bank account. At the current monthly rate of twenty-five hundred dollars ($2500) cash paid to defendant per month, and with an annual foreign bank account deposit of thirty thousand dollars ($30,000), defendant stood to receive an additional five hundred forty thousand dollars ($540,000) over the expected life of the conspiracy. This expected compensation is the absolute minimum contemplated by defendant, and does not take into account increases in his monthly stipend or further gifts such as the diamond and sapphire ring purchased by the Israelis for Anne Henderson Pollard. It can be seen from these facts, that throughout his relationship with the Israelis the lure of *money* motivated and, eventually, consumed this defendant.

In light of this overwhelming evidence of defendant's financial excesses, his suggestion that his espionage activities were intended to combat terrorism scarcely warrants examination. Yet only a cursory review of the evidence is necessary to dispel defendant's characterization of himself as a well-intended source of information crucial to Israeli anti-terrorism efforts.

First, of the thousands of pages of classified documents which defendant admitted delivering to the Israelis, only

a miniscule portion concern terrorist or counter-terrorist activities. Secondly, in his initial meetings with Aviem Sella in the summer of 1984, as well as in the meetings with Rafi Eitan in Paris in November, 1984, defendant was informed that the Israelis were *not* interested in U.S. classified information relating to terrorism. Third, and perhaps most revealing, Joseph Yagur actually rejected terrorist-related information when on an occasion early in the conspiracy it was offered by defendant. During one of their monthly meetings, defendant included some classified, terrorist-related information in materials he delivered to Joseph Yagur; Yagur specifically instructed defendant not to waste time obtaining this type of information.

In short, neither defendant's own conduct, nor that of his co-conspirators, provide any support for the claim that defendant's anti-terrorist beliefs played a major role in this conspiracy. In contrast, the evidence compels the conclusion that defendant had a keen interest in financial gain from the very outset of his relationship with the Israelis. As that relationship ripened, defendant's interest in money, and the lifestyle which that money made possible, became the force which drove defendant to provide increasingly greater numbers of classified documents despite the growing risk of apprehension.

* * * * * * *

All of the law enforcement personnel who have interviewed the defendant during post-plea debriefings have been impressed with the capacity of his memory. Defendant's ability to relate the classified information he obtained during his U.S. Navy employment remains undiminished after a year of incarceration. Only the passage of time will serve to minimize the extent and sensitivity of the information he retains. Only the imposition of a substantial prison term can guarantee that defendant will pass that time in an environment in which U.S. authorities can exercise some

control over the classified information defendant is capable of revealing.

In conclusion, an examination of defendant's conduct throughout the course of this espionage conspiracy, as well as at the time of his arrest, reveals only factors which aggravate the severity of the offense. The offense itself—espionage—is, of course, the most grievous of crimes. The commission of such an offense becomes intolerable in circumstances where, as here, one betrays his country for money. When in the days immediately prior to his arrest defendant had the opportunity to redress at least some of the damage he had wrought, he mislead the investigating agents, notified his co-conspirators and, once again, put his self-interest ahead of the national interest as he made his own plans to escape. He continued to pursue this course of action even on the day of his arrest, with the result that several of his Israeli co-conspirators succeeded in making good their escape from the United States.

It is in this light the government believes, that defendant's post-plea cooperation must be viewed. The value of this cooperation in connection with the government's damage assessment, and continuing espionage investigation is, as previously noted, conceded. Yet it has been offered by defendant belatedly, and without remorse for the crime he has committed. Accordingly, and in view of the severity and circumstances of the offense, it is submitted that the imposition of a substantial period of incarceration and a monetary fine is warranted.

Respectfully submitted,

/s/ Joseph E. DiGENOVA
JOSEPH E. DiGENOVA
United States Attorney

/s/ Stephen S. Spivack
STEPHEN S. SPIVACK
Assistant United States Attorney

/s/ Charles S. Leeper
CHARLES S. LEEPER
Assistant United States Attorney

/s/ David F. Geneson
DAVID F. GENESON
Assistant United States Attorney

## APPENDIX G

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

---

**Criminal No. 86-0207**

---

UNITED STATES OF AMERICA

v.

JONATHAN JAY POLLARD,

defendant.

**DECLARATION OF THE SECRETARY OF DEFENSE CASPAR W. WEINBERGER HEREBY DECLARES AND SAYS:**

1. (U) I have been the Secretary of Defense and the chief executive officer of the Department of Defense (DOD), an executive department of the United States, 10 U.S.C. 131, since 20 January 1981. As Secretary of Defense, I have authority, direction and control over the DOD, 10 U.S.C. 133(b), and am a member of the National Security Council.

* * * * * * *

24. (U) I have provided the foregoing statements to provide my views of the significant harm caused to national security by the defendant and as an aid to the Court. The data provided represents my opinions and conclusions stemming from my review of the data compromised, as well as from information obtained by me in my capacity as Secretary of Defense and as a member of the National Security Council. The defendant has substantially harmed the United States, and in my view, his crimes demand severe punishment. Because it may not be clear to the court that the defendant's activities have caused damage

of the magnitude realized, I felt is necessary to provide an informed analysis to the Court so that an appropriate sentence could be fashioned. My foregoing comments will, I hope, dispel any presumption that disclosures to an ally are insignificant; to the contrary, substantial and irrevocable damage has been done to this nation. Punishment, of course, must be appropriate to the crime, and in my opinion, no crime is more deserving of severe punishment than conducting espionage activities against one's own country. This is especially true when the individual spy has voluntarily assumed the responsibility of protecting the nation's secrets. The defendant, of course, had full knowledge and understanding of the sensitivities of the information unlawfully disclosed. To demonstrate that knowledge, I have attached copies of non-disclosure agreements which he voluntarily executed. Should the Court require further information or explanation of anything contained herein, you may provide the bearer of this document with your requirements and I will respond to them.

Under penalties of perjury, I hereby declare the foregoing statements to be true and correct to the best of my knowledge information and belief.

Executed this _____ day of _____ 1986.

Caspar W. Weinberger

## APPENDIX H

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

---

**Criminal No. 86-0207**

---

UNITED STATES OF AMERICA

v.

JONATHAN JAY POLLARD

### SUPPLEMENTAL DECLARATION OF CASPAR W. WEINBERGER SECRETARY OF DEFENSE

1. I am Caspar W. Weinberger, Secretary of Defense. I offer this declaration to supplement my *in camera* submission, which detailed the nature and extent of the harm defendant has caused to our national security, and to make known to the Court additional facts which have been brought to my attention. I also wish to address the defendant's self-serving contentions that his espionage activities were intended only to aid Israel, and the suggestion that his actions should be viewed as mere technical violations of laws intended to keep sensitive information from actual or potential enemies.

2. It is difficult for me, even in the so-called "year of the spy," to conceive of a greater harm to national security than that caused by the defendant in view of the breadth, the critical importance to the U.S., and the high sensitivity of the information he sold to Israel. That information was intentionally reserved by the United States for its own use, because to disclose it, to *anyone* or *any nation*, would cause the greatest harm to our national security. Our decisions to withhold and preserve certain intelligence infor-

mation, and the sources and methods of its acquisition, either in total or in part, are taken with great care, as part of a plan for national defense and foreign policy which has been consistently applied throughout many administrations. The defendant took it upon himself unilaterally to reverse those policies. In so doing, he both damaged and destroyed policies and national assets which have taken many years, great effort and enormous national resources to secure. Moreover, in light of the defendant's continued disclosures of sensitive information for publication by the press, there is ample cause to believe that Pollard will continue to divulge classified national defense information without restraint.

3. I respectfully submit that any U.S. citizen, and in particular a trusted government official, who sells U.S. secrets to *any* foreign nation should not be punished merely as a common criminal. Rather, the punishment imposed should reflect the perfidy of the individual's actions, the magnitude of the treason committed, and the needs of national security. Here, although the defendant had executed an oath to protect and safeguard classified information, he betrayed the public trust and the security of the United States in exchange for money. I believe these facts should be weighed heavily in fashioning the sentence to be imposed in order to protect the public confidence in our law, and restore the public's confidence in our ability and commitment to protect U.S. security.

4. It is also relevant that Pollard has recently analogized himself to an Israeli pilot shot down behind enemy lines, and has stated his hope that he will yet be able to immigrate to Israel. Whatever else his analogy suggests, it clearly indicates that his loyalty to Israel transcends his loyalty to the United States. Nor, apparently, does any residual loyalty to the United States persuade him that he should protect U.S. national defense information at all. Only a few days ago, on February 15, 1987, the Washington Post published an article about Pollard. That article

contained information purporting to reflect U.S. intelligence efforts. While I do not intend publicly to confirm or deny the accuracy of those statements, it is beyond cavil that, if true, such information should never be made publicly available. The defendant initially denied having been the source of the information, but when confronted with a polygraph examination on February 25, he acknowledge that he had either provided or confirmed certain of the information contained in that article by talking to a journalist. I have no way of knowing whether he provided additional information not published in that article, but I believe that there can be no doubt that he can, and will, continue to disclose U.S. secrets without regard to the impact it may have on U.S. national defense or foreign policy. Only a period of incarceration commensurate with the enduring quality of the national defense information he can yet impart, will provide a measure of protection against further damage to the national security.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge and belief:

/s/ Caspar W. Weinberger
CASPAR W. WEINBERGER

Executed this 3rd day of March, 1987

## APPENDIX I

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

---

**Criminal No. 86-0207**

---

UNITED STATES OF AMERICA

v.

JONATHAN JAY POLLARD

### GOVERNMENT'S REPLY TO DEFENDANT'S SENTENCING MEMORANDUM

The United States, by and through its attorney, the United States Attorney for the District of Columbia, hereby replies to Defendant JONATHAN J. POLLARD'S First Memorandum in Aid of Sentencing (hereinafter "Defendant's First Memorandum") and Defendant JONATHAN J. POLLARD'S Second Memorandum in Aid of Sentencing (hereinafter "Defendant's Second Memorandum"). In support of its Reply, the government submits the following.

* * * * * *

**2. Distorted Claims Regarding Lack of Harm to U.S. Security**

* * * * * *

Finally, defendant states that it is inconsistent for the Secretary of Defense to describe the damage caused by Israeli espionage against the U.S.,

[Text was redacted by the Government.]

This argument demonstrates, above all others, defendant's complete loss of any perspective consistent

with our national security. It is a sign of defendant's desperation that he seeks to excuse his traitorous conduct by noting the U.S. "spys" too. While the distinction may have been lost on defendant, we are confident that it remains clear to virtually any other citizen of the United States.

* * * * * *

Respectfully submitted,

/s/ Joseph E. DiGenova
JOSEPH E. DIGENOVA
United States Attorney

/s/ Stephen R. Spivack
STEPHEN R. SPIVACK
Assistant United States Attorney

/s/ Charles S. Leeper
CHARLES S. LEEPER
Assistant United States Attorney

/s/ David F. Geneson
DAVID F. GENESON
Assistant United States Attorney

**[Certificate of Service omitted in this printing]**

## APPENDIX J

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

---

CRIMINAL ACTION NOS.
86-207 & 86-208

---

UNITED STATES OF AMERICA,
PLAINTIFF,

-V-

JONATHAN JAY POLLARD AND
ANNE HENDERSON POLLARD,
DEFENDANTS.

---

WEDNESDAY, MARCH 4, 1987

WASHINGTON, D.C.

---

THE ABOVE-ENTITLED MATTER CAME ON FOR SENTENCING BEFORE THE HONORABLE AUBREY ROBINSON, CHIEF JUDGE, UNITED STATES DISTRICT COURT, COMMENCING AT APPROXIMATELY 2:10 P.M.

* * * * * *

[*35] MR. LEEPER: YOUR HONOR, I INTEND TO KEEP MY REMARKS MERCIFULLY BRIEF, AND I WILL BE ADDRESSING ONLY THE CASE OF UNITED STATES AGAINST JONATHAN POLLARD. MY COLLEAGUE, DAVID GENESON, WILL BE ADDRESSING THE COURT ON THE MATTER OF ANNE HENDERSON POLLARD.

IN READING THE VERSION OF THE OFFENSE THAT THIS DEFENDANT HAS WRITTEN, THE DEFENDANT'S VERSION OF THE OFFENSE, I WAS STRUCK BY THE FREQUENCY WITH WHICH HE WOULD MAKE A POINT

OR ATTEMPT TO MAKE A POINT BY LITERAL REFERENCES OR BIBLICAL REFERENCES. AND THERE WAS ONE IN PARTICULAR AT PAGE 14, THAT STRUCK ME. AT THAT TIME OR AT THAT PLACE IN HIS PLEADING, THE DEFENDANT SAID, "DESPAIR IS THE UNFORGIVABLE SIN."

AS I WAS GROWING UP, I WAS TAUGHT THAT THERE ARE, IN FACT, TWO SINS THAT ARE UNFORGIVABLE, AND THEY ARE ARROGANCE AND DECEPTION. AND, IN FACT, IT IS IN THE BOOK OF PROVERBS, AT CHAPTER 16, WHERE WE ARE TOLD, WHERE WE LEARN, THAT THERE ARE MANY SINS THAT THE LORD HATETH, BUT THE TWO THAT HIS SOUL DETESTETH ARE HAUGHTY EYES AND LYING TONGUE.

AND, IN FACT, ARROGANCE AND DECEPTION IS WHAT THAT REFERENCE MEANS. AND IT IS ARROGANCE AND DECEPTION WHICH DROVE THIS DEFENDANT TO COMMIT THE ACTS, THE CRIMINAL ACTS IN THIS CASE, AND THEY ARE ALSO THOSE TWO CHARACTER TRAITS, ARROGANCE AND DECEPTION, TYPICAL OF THE WAY HE HAS SOUGHT TO DEFEND AND EXCUSE THE THINGS THAT HE HAS DONE.

IN OUR VIEW, THERE IS NO BETTER EXAMPLE OF THAT THAN [*36] THE ARGUMENTS THAT HE MAKES WITH RESPECT TO THE HARM, OR IN HIS VIEW, THE LACK OF HARM, THAT HIS ACTIONS HAVE CAUSED TO THE NATIONAL SECURITY.

* * * * * *

[*37] * * * HE MADE A JUDGMENT, UP FRONT, ISRAEL, RIGHT OR WRONG, AND ONCE HE MADE THAT JUDGMENT, HE WAS ON AUTOMATIC PILOT. * * * NOW, IF THIS DEFENDANT HAD PERFORMED A CAREFUL ANALYSIS OF THE INFORMATION, WHICH HE COMPROMISED, THESE ARGUMENTS WOULD BE MERELY ARROGANT. BUT THEY ARE EXPOSED AS ENTIRELY DECEITFUL, WHEN YOU THINK, FOR JUST A MOMENT, ABOUT WHAT HAPPENED IN THIS CASE.

[*38] * * * IN SHORT, YOUR HONOR, OUR VIEW IS THAT HIS ARGUMENT THAT HE CAUSED NO HARM TO THE UNITED STATES NATIONAL SECURITY IS EQUAL PARTS OF ARROGANCE AND DECEIT. AND THOSE ARE THE SAME CHARACTERISTICS THAT LED HIM TO COMMIT THESE CRIMES IN THE FIRST PLACE.

* * * * * *

[*39] * * * ONE OF THE ARGUMENTS OR TACTICS THAT HAS BEEN USED BY THIS DEFENDANT IN HIS PLEADINGS, NOT HIS LAWYER'S PLEADINGS NOW BUT IN THE PLEADINGS THAT HE HAS WRITTEN, IS WORTHY OF MENTION, BECAUSE THIS TACTIC SHOWS THIS DEFENDANT'S PROPENSITY FOR TWISTING THE TRUTH, AND BECAUSE IT DEMONSTRATES WHAT A VENGEFUL PERSPECTIVE HE BROUGHT TO ALL HIS ACTIONS IN THIS MATTER.

IT ALSO DEMONSTRATES THE REAL AND CONTINUING POTENTIAL FOR RISK TO OUR NATIONAL SECURITY. AND I AM REFERRING TO THE EXPRESSION OF UTTER CONTEMPT THAT IS CONTAINED ON EVERY OTHER PAGE IN THIS DOCUMENT FOR THE UNITED STATES MILITARY AND INTELLIGENCE COMMUNITY. IT RUNS THROUGHOUT THIS VERSION OF THE OFFENSE.

WHEN YOU FIRST READ IT, IN ONE SENSE, IT MAY SEEM LIKE A PETTY TACTIC, WHERE AN INDIVIDUAL LIKE THE DEFENDANT TRIES TO BUILD HIMSELF UP BY RUNNING EVERYTHING ELSE AND [*40] EVERYBODY ELSE DOWN, MUCH LIKE THE WAY HE HAS SAVAGED HIS FELLOW INMATES, BOTH IN HIS PLEADINGS AND IN THE PRESS, DESCRIBING THEM IN DENEGRATING TERMS.

PARENTHETICALLY, I SHOULD MENTION THAT HE ASKED FOR LENIENCY BECAUSE HE SAYS HE IS DISLIKED BY HIS FELLOW INMATES. I WONDER IF IT HAS OCCURRED TO HIM THAT WHEN HE DESCRIBES PUBLICLY PEOPLE WITH WHOM HE IS INCARCERATED, USING SUCH TERMS AS, AND I QUOTE, "THE MOST DEGENERATE GROUP OF SUBHUMAN INDIVIDUALS

EVER COLLECTED UNDER ONE ROOF," THAT HE MAY BE THE CAUSE OF HIS OWN PROBLEMS.

BUT AS OFFENSIVE AS THOSE KINDS OF REMARKS MIGHT BE, I SUGGEST TO THE COURT THAT THERE IS A FAR MORE OMINOUS MEANING TO THE BLIND CONTEMPT THAT HE DISPLAYS IN THIS PLEADING FOR THE U.S. MILITARY AND INTELLIGENCE COMMUNITY. AND IT IS THOSE FEELINGS OF CONTEMPT THAT HE SAYS DROVE HIM TO COMMIT THIS CRIME, AND THEY HAVE ONLY DEEPENED SINCE THE TIME OF HIS ARREST AND INCARCERATION.

* * * * * *

[*42] * * * WHAT CAN BE DONE TO PROTECT OUR NATIONAL SECURITY FROM THE DAMAGING CONDUCT OF PEOPLE LIKE JONATHAN POLLARD?

I BEGAN WHAT I SAID HERE TODAY BY STATING MY VIEW THAT HIS CRIME AND HIS EFFORTS TO DEFEND IT ARE CHARACTERIZED BY ARROGANCE AND DECEPTION, AND I WOULD LIKE TO CLOSE BY ASKING YOUR HONOR TO CONSIDER, AS YOU IMPOSE SENTENCE, WHAT FURTHER UNAUTHORIZED DISCLOSURES OF CLASSIFIED INFORMATION WE CAN EXPECT FROM THIS DEFENDANT.

AND IN THAT REGARD, I WOULD LIKE YOU TO THINK A LITTLE BIT ABOUT HOW EFFECTIVE THE OTHER METHODS THAT HAVE BEEN TRIED HAVE BEEN.

AND I ALSO HAVE IN MIND A STATEMENT THAT JONATHAN POLLARD MADE HERE A FEW MOMENTS AGO. HE SAID, "AFTER 15 MONTHS, I HAVE LEARNED MY LESSON. I NOW KNOW THAT WHAT I SHOULD HAVE DONE WAS TO SEEK LEGAL ALTERNATIVES. TO THE EXTENT I WANTED TO GIVE INFORMATION AWAY TO ISRAEL, I SHOULD HAVE GONE TO THE DIRECTOR OF NAVAL INTELLIGENCE AND ATTEMPTED TO PERSUADE HIM TO CHANGE THE DISCLOSURE POLICIES."

HE LOOKED YOU RIGHT IN THE EYE AND HE TOLD YOU THAT, YOUR HONOR. AND IN ASSESSING THE VI-

RACITY OF THAT STATEMENT, I ASK YOU TO CONSIDER THE FOLLOWING THINGS:

ON JANUARY 3RD, 1985, RIGHT IN THE MIDST OF THIS [*43] CONSPIRACY, JONATHAN POLLARD SIGNED A SECURITY AGREEMENT. YOUR HONOR HAS SEEN IT. IT WAS ATTACHED TO SECRETARY WEINBERGER'S DECLARATION. IT IS NOT CLASSIFIED. AND HE STATED THEREIN, "I WILL NOT DISCUSS OR REVEAL ANY CLASSIFIED INFORMATION EXCEPT IN THE PERFORMANCE OF MY OFFICIAL DUTIES. I TAKE THIS OBLIGATION FREELY, WITHOUT ANY MENTAL RESERVATION OR PURPOSE OF EVASION."

THAT IS IN THE MIDDLE OF THE CONSPIRACY. HE GETS CAUGHT. HE IS ARRESTED. HE DECIDES TO PLEAD GUILTY AND HE COMES IN HERE, ON JUNE 4TH, 1986, AND AGAIN HE LOOKS YOUR HONOR IN THE EYE AND HE SAYS, "THERE IS A PLEA AGREEMENT, YOUR HONOR, THAT I HAVE SIGNED. I ACKNOWLEDGE ITS CONTENTS AND I AGREE TO LIVE UP TO THE TERMS AND CONDITIONS OF THE PLEA AGREEMENT," ONE OF WHICH INCLUDES A REQUIREMENT, ALMOST A HOUSEKEEPING REQUIREMENT, THAT WOULD CAUSE THAT LITTLE TROUBLE TO THIS DEFENDANT TO FOLLOW, THE MAN WHO CLAIMS TO HAVE LEARNED HIS LESSONS AFTER 15 MONTHS, A REQUIREMENT THAT IF HE WISHES TO SPEAK TO THE PRESS, ALL HE HAS TO DO IS TO SUBMIT THE INFORMATION HE WISHES TO DISCLOSE TO THE DIRECTOR OF NAVAL INTELLIGENCE, THE VERY SAME MAN HE SAYS NOW HE SHOULD HAVE GONE TO 15 MONTHS AGO.

HE LOOKED YOUR HONOR IN THE EYE ON JUNE 4TH, TOLD YOU HE WOULD ABIDE BY THOSE CONDITION, AND HE WASN'T TELLING YOUR HONOR THE TRUTH, BECAUSE ON ANY NUMBER OF OCCASIONS, AS RECENTLY AS A COUPLE OF WEEKS AGO, FOR EXAMPLE, ON JANUARY [*44] 29TH, HE SAT DOWN WITH A REPORTER AND IMPARTED INFORMATION WHICH WE MAINTAIN AND HAVE DEMONSTRATED TO THE COURT

IS, IN SOME INSTANCES, CLASSIFIED, NEVER BOTHERED TO FOLLOW THAT PROCEDURE.

AND FINALLY, ON NOVEMBER 12TH, 1986, HE SWORE AN OATH, EXECUTING A MEMORANDUM OF UNDERSTANDING, THAT HE WOULD FOLLOW THE PROVISIONS OF YOUR HONOR'S PROTECTIVE ORDER. AND ONE OF THOSE PROVISIONS WAS THAT HE WOULD NOT DISCLOSE ANY CLASSIFIED INFORMATION UNLESS HE OBTAINED WRITTEN APPROVAL FROM THE AGENCY WHOSE INFORMATION WAS CONTAINED IN THERE AND WITH APPROVAL OF THE COURT. IT WASN'T WORTH THE PAPER IT WAS WRITTEN ON.

I ASK YOUR HONOR TO REMEMBER THOSE THINGS AS YOU ASSESS THE VERACITY OF THE STATEMENTS THIS DEFENDANT JUST MADE ABOUT THE LESSONS HE HAS LEARNED.

AND I CLOSE BY SAYING, YOUR HONOR, THAT WHAT THESE THREE DOCUMENTS DEMONSTRATE, IN MY VIEW, IS THAT WHEN IT COMES TO PROTECTING AGAINST FURTHER DISCLOSURE OF U.S. SECRETS, JONATHAN JAY POLLARD IS NOT A MAN OF HIS WORD. AND IN COMBINATION WITH THE BREADTH OF THIS MAN'S KNOWLEDGE, THE DEPTH OF HIS MEMORY AND THE COMPLETE LACK OF HONOR THAT HE HAS DEMONSTRATED IN THESE PROCEEDINGS, I SUGGEST TO YOU, YOUR HONOR, HE IS A VERY DANGEROUS MAN.

THANK YOU.

* * * * * *

[*64] THE COURT: IS THERE ANYTHING FURTHER FROM COUNSEL?

WOULD THE COUNSEL COME FORWARD AND THE DEFENDANTS COME FORWARD.

I THINK I SHOULD STATE FOR THE RECORD THAT DURING MY ENTIRE TENURE IN THIS COURT, I HAVE NEVER HAD MORE VOLUMINOUS SUBMISSIONS IN CONNECTION WITH THE SENTENCING OF A DEFENDANT THAN I HAVE HAD IN THIS CASE. AND IN ADDITION

TO THOSE VOLUMINOUS SUBMISSIONS BY EACH SIDE, I HAVE ALSO RECEIVED NUMEROUS COMMUNICATIONS DIRECTED TO THE COURT WITH RESPECT TO THIS PROCEDURE.

I HAVE READ ALL OF THE MATERIAL ONCE, TWICE, THRICE, IF YOU WILL, AND I HAVE GIVEN CAREFUL CONSIDERATION, NOT ONLY TO THE SUBMISSIONS, BUT TO ARGUMENT OF COUNSEL, AND I PRONOUNCE SENTENCE AS FOLLOWS:

WITH RESPECT TO THE DEFENDANT JONATHAN JAY POLLARD, WHO IS BEING SENTENCED FOR VIOLATION OF TITLE 18 UNITED STATES CODE, SECTION 794 (C), I COMMIT THE DEFENDANT TO THE CUSTODY OF THE ATTORNEY GENERAL OR HIS AUTHORIZED REPRESENTATIVE FOR HIS LIFE. I AM REQUIRED, BY LAW, TO IMPOSE A $50 ASSESSMENT. [*65] THERE WILL BE NO FINE.

WITH RESPECT TO THE DEFENDANT, ANNE HENDERSON POLLARD, I COMMIT THE DEFENDANT ANNE HENDERSON POLLARD TO THE CUSTODY OF THE ATTORNEY GENERAL OR HIS AUTHORIZED REPRESENTATIVE ON THE FIRST COUNT OF THE INFORMATION TO A PERIOD OF FIVE YEARS.

WITH RESPECT TO THE SECOND COUNT OF THE INFORMATION, I COMMIT THE DEFENDANT TO A PERIOD OF FIVE YEARS TO RUN CONCURRENT BY THE COUNTS. AND AS REQUIRED BY THE COMPREHENSIVE CRIME CONTROL ACT, I IMPOSE A $50 ASSESSMENT ON EACH COUNT. THERE WILL BE A SPECIAL DESIGNATION WITH RESPECT TO THE PLACE OF INCARCERATION.

MR. J. HIBEY: YOUR HONOR, COULD I REQUEST THAT SHE BE ALLOWED TO REMAIN ON BOND PENDING THAT COMMITMENT AND DESIGNATION AND ALLOW HER TO SUBMIT HERSELF DIRECTLY TO THE INSTITUTION?

THE COURT: THAT REQUEST IS DENIED. RECESS THE COURT.

(WHEREUPON, AT 5:05 P.M., THE SENTENCING IN THE ABOVE-ENTITLED CASE WAS RECESSED.)

* * *

THIS RECORD IS CERTIFIED BY THE UNDERSIGNED TO BE THE OFFICIAL TRANSCRIPT IN THE ABOVE-ENTITLED CASE.

/s/Mindi L. Colchico
OFFICIAL COURT REPORTER

FILED
SEP 8 1992
OFFICE OF THE CLERK

No. 92-17

# In the Supreme Court of the United States

OCTOBER TERM, 1992

JONATHAN J. POLLARD, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
*Solicitor General*

ROBERT S. MUELLER, III
*Assistant Attorney General*

J. DOUGLAS WILSON
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standard of review to the district court's conclusion that the government did not violate its plea agreement with petitioner.

2. Whether, in order to obtain relief under 28 U.S.C. 2255 on a claim that the government breached the plea agreement, petitioner was required to show that the breach rose to the level of error required to justify collateral relief generally.

3. Whether the tying of petitioner's plea agreement to that of his wife rendered petitioner's plea involuntary.

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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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No. 92-17

JONATHAN J. POLLARD, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 959 F.2d 1011. The opinion of the district court (Pet. App. 51a-70a) is reported at 747 F. Supp. 797.

### JURISDICTION

The judgment of the court of appeals was entered on March 20, 1992. On June 10, 1992, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 2, 1992, and the petition was filed on July 1, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After pleading guilty in the United States District Court for the District of Columbia, petitioner was convicted of conspiracy to deliver defense information to a foreign government, in violation of 18 U.S.C. 794(c). He was sentenced to life imprisonment. Petitioner did not appeal his conviction or sentence. He subsequently filed a motion under 28 U.S.C. 2255 to vacate his conviction and withdraw his guilty plea. The district court denied the motion, Pet. App. 51a-70a, and the court of appeals affirmed, *id.* at 1a-50a.

1. Between June 1984 and November 1985, petitioner, an Intelligence Research Specialist with the United States Navy, removed large amounts of highly classified United States intelligence information from his office, copied it, and delivered it to agents of the Government of Israel. In November 1985, agents of the FBI and the Naval Investigative Service questioned petitioner about those activities. During the questioning, petitioner called his wife, Anne Pollard, and alerted her (through the use of a code word) to the fact that he was being questioned. Anne Pollard then removed a suitcase containing classified information from the Pollards' apartment and informed petitioner's Israeli handlers that he was being questioned. Pet. App. 3a-4a.

On November 21, 1985, petitioner was arrested and charged with transmitting defense information to a foreign government. The next day, Anne Pollard was arrested and charged as an accessory. Both petitioner and his wife were initially held without bond, but Anne Pollard was released on bail in February 1986 because of medical problems. During questioning both before and after his arrest, petitioner refused to identify the foreign government to which he delivered the classified information or the foreign intelligence agents involved, thereby

enabling his Israeli handlers to leave the United States without being apprehended. Pet. App. 4a.

2. After his arrest, petitioner and the government began plea negotiations. Petitioner sought to enter a plea in part to enable his wife to do so as well. In May 1986, petitioner agreed to plead guilty to one count of conspiracy to deliver national defense information to a foreign government. He promised to cooperate fully with the government's ongoing investigation and damage assessment and not to disseminate any information concerning his crimes without submitting to preclearance by the Director of Naval Intelligence. In return, the government agreed not to charge petitioner with additional crimes and to enter into a plea agreement with Anne Pollard. Petitioner's plea agreement provided that failure by Anne Pollard to adhere to the terms of her agreement would entitle the government to void his agreement, and her agreement contained a mirror-image provision. Pet. App. 4a-5a, 7a, 79a, 82a-83a.

In addition, petitioner's plea agreement contained the following provisions (Pet. App. 77a):

> (a) When [petitioner] appears before the Court for sentencing * * * the Government will bring to the Court's attention the nature, extent and value of his cooperation and testimony. Because of the classified nature of the information [petitioner] has provided to the Government, it is understood that particular representations concerning his cooperation may have to be made to the Court *in camera*. In general, however, the Government has agreed to represent that the information [petitioner] has provided is of considerable value to the Government's damage assessment analysis, its investigation of this criminal case, and the enforcement of the espionage laws.

> (b) Notwithstanding [petitioner's] cooperation, at the time of sentencing the Government will recommend that the Court impose a sentence of a substantial period of incarceration and a monetary fine. The Government retains full right of allocution at all times concerning the facts and circumstances of the offenses committed by [petitioner]. * * * [Petitioner] understands that, while the Court may take his cooperation into account in determining whether or not to impose a sentence of life imprisonment, this agreement cannot and does not limit the court's discretion to impose the maximum sentence.

At a hearing on June 4, 1986, the district court questioned petitioner about the rights he was surrendering by pleading guilty, his understanding of the possible sentence he faced, and the terms of the agreement. After being assured by petitioner and his attorney that petitioner understood the agreement, the district court accepted petitioner's guilty plea. Pet. App. 6a.

3. In memoranda submitted to the district court prior to sentencing, the government maintained that petitioner had seriously damaged the national security and that he was not remorseful for his actions. The government also noted that petitioner had violated the terms of the plea agreement by giving interviews to a member of the press without obtaining the approval of the Director of Naval Intelligence. The government supported its filing with a classified memorandum from the Secretary of Defense, which catalogued the damage that petitioner had caused to the national security, represented that the damage had been "substantial and irrevocable," and requested "severe punishment." Pet. App. 6a-7a, 98a. The Secretary of Defense also submitted an unclassified declaration reaffirming those submissions. *Id.* at 6a-7a, 99a-101a. Petitioner emphasized the extent and value of his cooperation. *Id.* at 7a.

After hearing allocution, the district court sentenced petitioner to life imprisonment and Anne Pollard to five years' imprisonment. Petitioner did not appeal his conviction or sentence. He did, however, file a timely motion under Fed. R. Crim. P. 35 for reduction of his sentence, on the ground that the sentence was disproportionate to those imposed on other individuals convicted of espionage whose actions were arguably more damaging to the United States. The district court denied that motion, and petitioner did not appeal. Pet. App. 7a.

4. In March 1990, petitioner filed the motion under 28 U.S.C. 2255 that is at issue here. The district court denied the motion. Pet. App. 51a-70a. It first rejected petitioner's contention that the government had violated a promise not to seek a life sentence, concluding that the declaration by the Secretary of Defense did not improperly argue for a life sentence and that the government had not failed adequately to advise the court of petitioner's cooperation. *Id.* at 59a-64a. The court also held that petitioner's plea had been knowing and voluntary and that he had not been coerced into pleading guilty by the "wiring" of his plea to his wife's plea. *Id.* at 66a-68a.[1]

[1] When he filed his motion under 28 U.S.C. 2255, petitioner appended an affidavit of Professor Alan Dershowitz stating that Dershowitz had asked retired Justice Arthur Goldberg to investigate the reasons for petitioner's life sentence. According to the affidavit, Justice Goldberg discussed the matter with the sentencing judge (Chief Judge Aubrey Robinson), who told him that petitioner had provided Israel with information demonstrating U.S. knowledge of Israeli-South African defense cooperation, and that those details had "weighed heavily" in the sentence. Dershowitz claimed that petitioner had never provided the Israelis with such information and that Justice Goldberg therefore inferred that the prosecution might have made an improper ex parte submission to the district court. The affidavit stated that Justice Goldberg re-

5. The court of appeals affirmed. Pet. App. 1a-50a. Initially, the court held that petitioner's plea was not rendered involuntary because it was "wired" to his wife's. *Id.* at 12a-15a. The court acknowledged that "a threat of long imprisonment for a loved one" could constitute a strong inducement for a defendant to plead guilty, but it concluded that the inducement here did not render petitioner's plea involuntary. *Id.* at 13a-14a. The court likewise held that Anne Pollard's illness did not affect the voluntariness of petitioner's plea. In the court's view, "[t]he appropriate dividing line between acceptable and unconstitutional plea wiring does not depend upon the physical condition or personal circumstances of the defendant; rather, it depends upon the conduct of the government." *Id.* at 14a-15a. Here, the court found no evidence that the government acted in bad faith. *Id.* at 15a.

The court of appeals also held that the government did not breach the plea agreement during allocution. At the outset, the court held that, although "[t]he meaning of a plea agreement—at least its facial meaning—is * * *

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lated this information to Dershowitz before Justice Goldberg died on January 18, 1990. Pet. App. 7a-8a.

Petitioner moved to disqualify Judge Robinson on the ground that he had knowledge of the matters in the affidavit and thus might be a witness at an evidentiary hearing on the motion. Pet. App. 8a. Judge Robinson stated that he did not receive ex parte information from the government and concluded that because his knowledge of the disputed facts had been gained in a judicial, as opposed to a personal, capacity, he need not disqualify himself. *Id.* at 54a, 58a. The court of appeals affirmed the district court's rulings on these points. *Id.* at 32a-34a. It characterized the Dershowitz affidavit as "a very weak submission" that "did not suffice to require a hearing into the question it raised," without regard to Judge Robinson's attestation that he had not entertained ex parte contacts with the government. *Id.* at 33a. Petitioner does not challenge the court of appeals' disposition of that issue.

reviewed *de novo*," a claim that the "government's allocution violated limitations in a plea agreement * * * presents a mixed question of law and fact in which the factual aspects usually predominate," and that a deferential standard of review was appropriate on that issue. Pet. App. 17a. On the merits, the court rejected petitioner's contention that the submission by the Secretary of Defense constituted an implicit argument for a life sentence. It concluded that although the "government pressed its case against [petitioner] at sentencing with considerable force," the Secretary's call for a "severe punishment" was not "equivalent to an appeal for a life sentence." *Id.* at 20a-21a. The court similarly rejected petitioner's claim that the government failed to abide by its obligation to describe his cooperation to the sentencing court, *id.* at 21a-25a, and his claim that the government violated the plea agreement by commenting on his motives for committing the offense and his character, *id.* at 25a-32a.

Judge Williams dissented. Pet. App. 36a-50a. He agreed that the "wiring" of petitioner's plea to his wife's did not render petitioner's plea involuntary, and that an appellate court should review deferentially a district court's ruling that the government's allocution did not violate the terms of a plea agreement. *Id.* at 37a-39a. Judge Williams believed, however, that the government had violated the "spirit" of petitioner's plea agreement in its description of petitioner's cooperation and its sentencing recommendation, and had violated the terms of the agreement by failing to allocute only on the "facts and circumstances" of petitioner's offense. *Id.* at 41a-47a.

## ARGUMENT

1. Petitioner contends (Pet. 12-26) that he is entitled to relief under 28 U.S.C. 2255 because, in his view, the

government violated the plea agreement in its submissions to the district court at sentencing. After a searching analysis, the court of appeals rejected that contention. Further review is not warranted.

In the first place, this case would not be an appropriate vehicle for consideration of the legal issues petitioner raises, because there is a threshold obstacle to petitioner's challenge to his conviction on this ground: petitioner did not object to the government's submissions at the time of sentencing, when he filed a motion for reduction of sentencing, or by taking an appeal, and petitioner has not satisfied the cause-and-prejudice standard for excusing his procedural default in these proceedings under 28 U.S.C. 2255. See *United States* v. *Frady*, 456 U.S. 152 (1982). Although the court of appeals chose not to resolve the procedural default issue, and instead to reject petitioner's claim of a plea-agreement violation on the merits (see Pet. App. 10a-11a), this Court would be presented at the outset with the waiver issue. Furthermore, as the court of appeals pointed out (Pet. App. 11a), the failure by petitioner and his counsel to object to the government's allocution at the time greatly undermines the credibility of petitioner's assertion three years later that the government's actions constituted the sort of miscarriage of justice for which collateral relief under 28 U.S.C. 2255 was intended. Petitioner committed a grave offense against the United States, and the sentence imposed by the district court was entirely appropriate to the seriousness of the offense.

a. Petitioner first contends (Pet. 12-19) that the Court should grant certiorari to consider the appropriate standard to be applied by a court of appeals in reviewing a district court's determination that the government adhered to a plea agreement. The court below held that the meaning of a plea agreement, at least on its face, presents a question of law that is reviewed de novo, but

that the district court's resolution of any disputed factual issues is reviewed under the clearly erroneous standard. Pet. App. 17a-20a. As petitioner acknowledges (Pet. 17), the distinction between issues of fact and issues of law for reviewability purposes is well grounded in this Court's decisions. See, *e.g.*, *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984).

Morever, contrary to petitioner's contention (Pet. 12-14), there is no circuit conflict on the reviewability issue that warrants review here. The decisions of the Fourth, Seventh, and Eleventh Circuits that petitioner cites (Pet. 12-13) properly applied the clearly erroneous standard of review to the district court's resolution of disputed issues of fact relevant to the question whether there was a breach of a plea agreement. See *United States* v. *Conner*, 930 F.2d 1073, 1076 (4th Cir.), cert. denied, 112 S. Ct. 420 (1991); *United States* v. *Ataya*, 864 F.2d 1324, 1337 (7th Cir. 1988); *Raulerson* v. *United States*, 901 F.2d 1009, 1012 (11th Cir. 1990). Those decisions (and the decision below) are, in turn, consistent with the decisions of the First, Third, Ninth, and Tenth Circuits on which petitioner relies (Pet. 13-14) in support of his contention that a de novo standard is appropriate.

For example, the Third Circuit, in *United States* v. *Moscahlaidis*, 868 F.2d 1357, 1360 (1989), explicitly stated that the clearly erroneous standard of review applies to factual issues, but that the ultimate question whether the plea agreement was violated is subject to plenary review. The First Circuit cited *Moscahlaidis* with approval in *United States* v. *Canada*, 960 F.2d 263, 269 (1992), and *United States* v. *Atwood*, 963 F.2d 476, 478 (1992). Similarly, in stating that de novo review was appropriate in *United States* v. *Jimenez*, 928 F.2d 356, 358, cert. denied, 112 S. Ct. 164 (1991), the Tenth Circuit

relied on its prior decision in *United States* v. *Shorteeth*, 887 F.2d 253 (1989), which (likewise citing *Moscahlaidis*) observed that because the facts were undisputed, a de novo standard of review was appropriate. See 887 F.2d at 256. Finally, the published Ninth Circuit decision on which petitioner relies, *United States* v. *Fisch*, 863 F.2d 690 (1988), was a per curiam ruling in which the court stated only that it was reviewing de novo the defendant's contention there that the government breached the plea agreement. *Fisch* did not address the standard for reviewing the district court's resolution of any disputed issues of fact that may be relevant to that inquiry, and it therefore does not conflict with the decision below.

Despite his reliance on the supposed conflict among the decisions just discussed, petitioner acknowledges the difference recognized in those decisions between issues of fact and issues of law for standard-of-review purposes. He also concedes that the court below applied a de novo standard in reviewing the meaning of the plea agreement and applied the clearly erroneous standard only in reviewing the district court's factual assessment of the government's conduct. See Pet. 14. Petitioner nevertheless contends (Pet. 14-15) that review is warranted because there are differences among appellate rulings regarding the nature and scope of the de novo and clearly erroneous standards of review. Specifically, he points out that the court of appeals in this case held that "[t]he meaning of a plea agreement—at least its facial meaning—is of course reviewed *de novo*," Pet. App. 17a, but that the Ninth Circuit held in *United States* v. *Krasn*, 614 F.2d 1229, 1233 (1980), that "[w]hat the parties agreed to" is a question of fact subject to the clearly erroneous standard. Even if there were a clear circuit conflict in the subcategory of cases involving the meaning of a plea agreement, however, this case would not present a suitable occasion for resolving it, because the court below

applied the more stringent de novo standard of review that petitioner urges.

In any event, not all issues concerning the contents of a plea agreement can be placed in one category or the other. When the question is whether the government breached an unambiguous term of a written plea agreement, the meaning of that term is subject to de novo review. In other cases, however, the defendant may contend that the parties agreed to a condition that was not reduced to writing, or to an interpretation of a term in the written document. In such a case, the question whether the parties actually agreed to the unwritten condition or interpretation is one of fact, and the district court's resolution of that question is subject to review under the clearly erroneous standard. The decision below is consistent with this view, for it states that at least the "facial" meaning of the agreement is subject to de novo review, thereby leaving open the possibility in other cases that factual issues beyond the face of the agreement would be governed by a different standard of review.

Finally, the standard-of-review issue petitioner raises would have no effect on the outcome of his challenge to his conviction. The court of appeals analyzed petitioner's claim with a level of detail that manifests a searching inquiry. The court parsed the Secretary of Defense's submission to determine whether it contained an implicit appeal for a life sentence,[2] and the court stated its conclusion in a manner that indicates that it would have reached the same result under any standard of review: "we do not think that in [pressing its case

[2] Although the plea agreement did not expressly forbid the government from recommending a life sentence, petitioner maintains that the government made such a promise implicitly, and the court of appeals decided the case on the assumption that such an implicit promise had been made. See Pet. App. 16a, 20a.

against petitioner] the government violated its promise not to recommend a life sentence; certainly we find no clear error in the district judge's determination that the government adhered to its promise." Pet. App. 20a.

Similarly, the court of appeals thoroughly analyzed petitioner's claim that the government failed adequately to describe petitioner's cooperation to the district court. It recounted the government's description of petitioner's cooperation and sifted through the details of his claim that other parts of the government's submission effectively discounted that description. The court concluded, moreover, that the government's discussion of petitioner's cooperation "did not explicitly or implicitly violate the plea agreement," which again suggests that the court of appeals would have reached the same result under a de novo standard of review. Pet. App. 22a-25a. And the court engaged in an equally thorough review of petitioner's contention that the government improperly commented on his character and motivation for committing his crime. *Id.* at 25a-27a. Accordingly, petitioner received essentially the degree of appellate review he claims is appropriate.

b. Petitioner also contends (Pet. 19-26) that the court of appeals applied an improper standard for determining whether he was entitled to relief on collateral attack of his conviction. Specifically, petitioner argues that instead of holding that he was entitled to relief upon a finding that the government breached the plea agreement in any respect, the court of appeals erroneously required him to show that the breach rose to the level of a miscarriage of justice. That contention does not warrant review.

As an initial matter, the court of appeals rejected petitioner's claims that the government breached the plea agreement by implicitly arguing for a life sentence and by failing adequately to explain the extent and value of

his cooperation. Pet. App. 19a-25a. Accordingly, insofar as those alleged breaches are concerned, this case does not present the issue whether the court employed the proper standard in determining whether a breach of the plea agreement would have entitled petitioner to relief under 28 U.S.C. 2255.

The remaining breach alleged by petitioner was that the government exceeded the limits of the reservation in the plea agreement of its full right of allocution concerning the "facts and circumstances" of petitioner's offense. The court of appeals correctly held, however, that petitioner is not entitled to relief on the theory that the government violated the "facts and circumstances" provision by commenting on his motives and character at sentencing—*i.e.*, by referring to his "arrogance and deception" and describing him as "vengeful," "unworthy of trust," or "contemptuous." See Pet. App. 25a. The court of appeals found the "facts and circumstances" provision ambiguous, and it believed that considerable weight should be placed on the contemporaneous interpretation of it by petitioner's counsel, who failed to object to the government's allocution. *Id.* at 25a-27a. The court declined, however, to determine whether the "facts and circumstances" provision of the agreement was technically breached. It reasoned that even if the government's allocution "crossed the limits of the plea agreement," it fell far short of being the sort of "fundamental defect" in petitioner's sentencing or "miscarriage of justice" for which relief is available under 28 U.S.C. 2255. Pet. App. 27a-28a (quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962)). The court noted that petitioner and the dissenting judge below had identified "no case" in which relief was granted under 28 U.S.C. 2255 based on an allegation that the government's arguments at sentencing, Pet. App. 30a—the "mood, atmosphere, or 'rhetoric' of the government's allocution,"

*id.* at 31a—"amounted to an *implicit* breach of a partially ambiguous plea agreement," *id.* at 30a. That holding does not warrant review.

Petitioner still has not identified any decision of another court of appeals that has granted relief under Section 2255 based on a claim of an implicit breach of the plea agreement resulting from the tone of the government's allocution at sentencing.[3] Compare *United States* v. *Benchimol*, 471 U.S. 453, 456 (1985); *id.* at 457 (Stevens, J., concurring in the judgment). Furthermore, as the court of appeals correctly recognized (Pet. App. 11a-12a), this Court has repeatedly held that in order to obtain relief on collateral attack under Section 2255, a defendant must establish that the errors of which he complains amount to a "fundamental defect which inherently results in a complete miscarriage of justice." *Hill* v. *United States*, 368 U.S. at 428; *United States* v. *Addonizio*, 442 U.S. 179, 185 (1979). Nothing in those decisions carves out an exception for claims based on an alleged breach of a plea agreement. In fact, the court of appeals understood petitioner to have agreed with that standard in the proceedings below. See Pet. App. 11a.

Contrary to petitioner's contention (Pet. 20-21), this result is not inconsistent with *Santobello* v. *New York*, 404 U.S. 257 (1971). There, the Court held that the Due Process Clause requires the government to keep the promises it makes to induce a defendant to plead guilty. The government's failure to keep such promises entitles

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[3] The decisions cited by petitioner (Pet. 22) in which relief was granted under Section 2255 are not to the contrary. It does not appear in those cases that the government made a distinct argument concerning the heightened standard for relief under Section 2255 (or, therefore, that the court had occasion to address that issue), and the alleged breach went much more directly to the core of the plea agreement in those cases than in this one.

the defendant to obtain relief on direct review.[4] Nothing in *Santobello* holds, however, that the Court intended to alter long-settled rules regarding the availability of relief on collateral attack of a conviction.

In any event, as the district court correctly held, the government did not breach the "facts and circumstances" provision of the plea agreement, because "motive and character, insofar as they place [petitioner's] conduct in some context and assist in the sentencing decision, are facts and circumstances of [petitioner's] crimes, and are directly relevant to the Court's task at sentencing." Pet. App. 62a. Accordingly, there is no need for this Court to consider whether the government's allocution, if it did constitute a breach of the "facts and circumstances" provision, was a fundamental defect of the sort that would warrant setting aside a conviction on collateral attack under 28 U.S.C. 2255.

2. Petitioner's final contention (Pet. 26-29) is that the government improperly "wired" his guilty plea to that of his wife. The court of appeals correctly rejected that contention.

The government may not induce a defendant to plead guilty "by actual or threatened physical harm or by mental coercion overbearing the will of the defendant." *Brady* v. *United States*, 397 U.S. 742, 750 (1970). In *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 n.8 (1978), this Court noted that "a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused * * * might pose a greater danger of inducing a false guilty plea by skewing the as-

[4] Even then, relief is not available unless the defendant shows that his plea rests to a "significant degree" on the promise that was allegedly breached. 404 U. S. at 262. Petitioner's claim based on the supposed promises going to the tone of the government's allocution does not satisfy that standard.

sessment of the risks a defendant must consider." *Bordenkircher* did not, however, rule out such plea agreements, and since that decision, the courts of appeals have declined to hold that they violate the Due Process Clause. See, *e.g.*, *United States* v. *Marquez*, 909 F.2d 738, 741-742 (2d Cir. 1990), cert. denied, 111 S. Ct. 957 (1991); *Politte* v. *United States*, 852 F.2d 924, 929-931 (7th Cir. 1988); *Mosier* v. *Murphy*, 790 F.2d 62, 66 (10th Cir.), cert. denied, 479 U.S. 988 (1986); *United States* v. *Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979). Instead, the government's offer of lenient treatment to a third person is simply one factor bearing on the question whether the defendant's plea was voluntary. See *United States* v. *Marquez*, 909 F.2d at 742; *United States* v. *Daniels*, 821 F.2d 76, 80 (1st Cir. 1987).

Consistent with the views of other courts of appeals, the court in this case held that such guilty pleas are not in themselves unconstitutional, but that the government's improper use of pressure exerted on a third person could render a guilty plea involuntary. Pet. App. 12a-15a. The court then held that petitioner's plea was not rendered involuntary simply because it had been obtained in part by petitioner's desire to obtain a plea agreement for his wife. That fact-bound contention is not worthy of review, especially in light of petitioner's failure to claim that the plea arrangement caused him to plead guilty to an offense of which he is not guilty.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-17

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

JONATHAN J. POLLARD,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## REPLY MEMORANDUM

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## REPLY MEMORANDUM

The arguments of the United States in opposition to certiorari are constructed almost entirely on fundamental mischaracterizations of the questions presented and the arguments advanced by petitioner, inaccurate interpretations of the relevant authorities, and misstatements of the facts and the decision below.

1. The government's threshold argument—that the Court should not review the important, substantial and recurring legal questions presented by this case because petitioner "has not satisfied the cause-and-prejudice standard for excusing . . . procedural default" (Opp. at 8)—should be rejected by this Court just as it was by the court below. The Court of Appeals chose to review "petitioner's claim of a plea-agreement violation on the merits," Opp. at 8, concluding that "the law is rather unclear as to what claims can be raised in a § 2255 motion that were not raised at sentencing," and that "it may well be that the government . . . waived its waiver claim . . . ." Pet. App. 10a; *see also id.* 36a (Williams, J., dissenting) ("As the government at no point below asserted the cause and prejudice standard, it has waived the defense."). Moreover, the government's belated waiver defense does not relate to the *jurisdiction* of this Court or the Court of Appeals because even if it were factually and legally supportable and timely presented, the "cause-and-prejudice" standard of *United States v. Frady*, 456 U.S. 152 (1982), establishes only a prudential rule for hearing collateral attacks under § 2255.

2. The government's contention that "there is no circuit conflict" (Opp. at 9) as to Question 1 regarding the standard of review to be applied to breach of plea agreement claims is predicated upon a substantial distortion both of the decision below and the decisions of the other circuits on *either* side of the issue. In fact, the court below explicitly recognized and commented on the conflict. Pet. App. 16a (noting that standard of review is "unsettled" and that "[s]everal circuits review district court determinations of whether or not a plea agreement has been breached *de*

*novo*," while "[s]everal others will set aside a district court's finding concerning breach of a plea agreement only if clearly erroneous").

Just two weeks ago, on September 1, 1992, the First Circuit expressed heightened concern over the escalating uncertainty on this issue both within and among the circuits:

> Recent precedent suggests that the question of whether a plea agreement has been breached is one of law and that our review is plenary . . . . Other cases hold that a district court's determination of breach or no breach is a factual question reviewable for clear error only.

*United States v. Roberts*, No. 91-1721, 1922 WL 209646, at *2 & n.5 (1st Cir. 1992) (citations omitted).

The government's denial of the conflict among the circuits relative to the standard of review is particularly perplexing since its advocacy, after the decision below, for application of a clearly erroneous standard in a breach of plea agreement case was squarely and unequivocally rejected by the First Circuit: "Contrary to the government's assertion, [the First Circuit] reviews *de novo* the question whether the government has breached a plea agreement with a defendant." *Kingsley v. United States*, 968 F.2d 109, 114 (1st Cir. 1992).

As the government well knows from its defeats in other cases, at least three other circuits have held that breach of plea agreement claims are subject to *de novo* review. Pet. at 12-19; *see, e.g., United States v. Moscahlaidis*, 868 F.2d 1357, 1360 (3d Cir. 1989) ("The government argues that the standard of review should be plain error. It is not."); *United States v. Fisch*, 863 F.2d 690 (9th Cir. 1988); *United States v. Jimenez*, 928 F.2d 356, 363 (10th Cir.), *cert. denied*, 112 S. Ct. 164 (1991). Three other circuits, like the court below, have held that the clearly erroneous standard applies. *See, e.g., United States v. Conner*, 930 F.2d 1073, 1076 (4th Cir.), *cert. denied*, 112 S. Ct. 420 (1991); *United States v. Ataya*, 864 F.2d 1324, 1337 (7th

Cir. 1988); *Raulerson v. United States*, 901 F.2d 1009, 1012 (11th Cir. 1990).

The government's attempt to reconcile these sharply and evenly divided lines of authority is either disingenuous or confused. It begins with the unremarkable proposition that "the distinction between issues of fact and issues of law for reviewability purposes is well grounded in this Court's decisions." Opp. at 9. But that postulate ignores the "vexing nature" of this distinction, *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982), the intense confusion it can engender, *see Roberts*, 1992 WL 209646 at *2, and the clear disagreement among the circuits as to whether a breach of plea agreement claim raises a predominantly factual issue, subject to clearly erroneous review, or a legal issue that must be reviewed *de novo*.

The government itself has apparently been confused by the fact/law inquiry in this case. It mistakenly and repeatedly asserts that there were "disputed issues of fact" below, and that the court "applied the clearly erroneous standard only in reviewing the district court's factual assessment of the government's conduct." Opp. at 9-10. That contention is flatly and demonstrably incorrect. The historical facts here—the terms of the agreement and what the government said and did during the sentencing proceedings—are all on the record and entirely undisputed. The only question before the court below was whether the district court drew the correct legal conclusions when it measured the government's conduct against the obligations imposed by the agreement, *i.e.*, whether the government's admitted, acknowledged and undisputed conduct constituted a breach of its promises to petitioner. As the court below correctly understood, "the question is *only* whether the government's arguments transgressed the agreed norm." Pet. App. 19a (emphasis added).

Therefore, to say, as the government does, that petitioner's arguments raised issues "of fact," and that the clearly erroneous standard therefore governs, is simply wrong. The court below was deferring not to factual de-

cisions by the district judge, but to "his assessment of whether the government's conduct" violated the plea agreement's terms. Pet. App. 17a. And as the government is forced to concede, a number of courts have squarely held that the "ultimate question whether the plea agreement was violated *is subject to plenary review*" because it is a question of law. Opp. at 9 (emphasis added). Those courts have done so under circumstances almost identical to those presented in this case.

For example, in *United States v. Moscahlaidis*, 868 F.2d at 1360, the government, as in this case, promised to limit its sentencing allocution to the " 'nature and extent of [the defendant's] activities with respect to the case.' " *Id.* at 1362. The government breached that promise when the prosecutor made statements concerning the defendant's " 'greed and moral bankruptcy' " and " 'utter contempt' " for society, expressing his "opinion of [the defendant's] character." *Id.* In a decision diametrically opposed to the Court of Appeals in this case, the Third Circuit concluded that "[w]hether the government's conduct violates the terms of the plea agreement is a *question of law and our review is plenary.*" *Id.* at 1360 (emphasis added).

*United States v. Canada*, 960 F.2d 263 (1st Cir. 1992), involved an issue similar to the contention here that the government breached the plea bargain by failing to inform the sentencing court of the "considerable value" of petitioner's cooperation[1] and by "calling for a life sentence

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[1] The government has persistently mischaracterized the plea agreement in this case by stating that it had promised only to "advise the court of the petitioner's cooperation," Opp. at 5, or "describe" his cooperation, *id.* at 7, or "explain the extent and value of his cooperation." *Id.* at 12-13. In fact, it agreed in writing to go much further and affirmatively to "represent" that his cooperation had been "of considerable value to the Government's . . . enforcement of the espionage laws." Pet. App. 77a. The government's allocution instead denigrated the value of petitioner's cooperation, breaching its promise *as a matter of law*. The district court plainly misinterpreted the agreement as permitting the government to "explain the positive value of the cooperation in one sense (damage assessment)" while at the same time "noting that

in all but name." Pet. App. 44a (Williams, J., dissenting); *see* Pet. at 4-7. In *Canada*, the defendant claimed that the government's "overall conduct," and its "grudging and apologetic" performance, 960 F.2d at 269, amounted to "an implied repudiation" (*id.* at 271) of its promises to recommend a particular sentence and to advise the Court of *"the full nature and extent of* [*the defendant's*] *cooperation." Id.* at 268 (emphasis in original). The First Circuit, like the Third Circuit in *Moscahlaidis*, held that the defendant's breach of plea agreement claims presented legal questions subject to *de novo* scrutiny. *Id.* at 269.

The Ninth and Tenth Circuits have also implemented the *de novo* review standard in cases involving virtually identical circumstances. *See United States v. Fisch*, 863 F.2d at 690 (where the court "review[ed] *de novo* [defendant's] claim" that the government breached its agreement concerning defendant's cooperation); *United States v. Jimenez*, 928 F.2d at 363 (whether the government's statements during sentencing breached its promise raised "a question of law subject to *de novo* review").

Several other circuits have taken the opposite view: that the "ultimate question" (Opp. at 9) whether government actions violate a plea bargain raises an issue of fact, even where, as here, the terms of the plea agreement and the underlying facts surrounding its performance are not in dispute.

The government's efforts to explain away this clear and irreconcilable circuit conflict do not even come close. For example, while the government asserts that *Raulerson v. United States*, 901 F.2d at 1012, involved "disputed issues of fact," that case involved no dispute whatsoever as to *either* the express, unambiguous provisions of the plea agreement, *id.*, *or* the various actions of the government that formed the predicate of the defendant's breach claim.

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defendant had frustrated the Government's efforts in another sense (law enforcement)." Pet. App. 63a-64a. But this construction, which the Court of Appeals accepted, *id.* 23a n.8, was directly contrary to the explicit written promise.

*See id.* at 1012-13. Nonetheless, the Eleventh Circuit held that the "district court's findings on the scope of the agreement and whether the government breached its promise will only be set aside if they are clearly erroneous." *Id.* at 1012.

Nor were there any contested facts in *United States v. Ataya*, 864 F.2d at 1324. The government claimed that the defendant breached a plea bargain and the Seventh Circuit invoked the clearly erroneous standard even though the "plea agreement unambiguously set forth the defendant's obligations" to cooperate with the government and the defendant indisputably "refus[ed] to cooperate with the government." *Id.* at 1335, 1337. And the Fourth Circuit's decision in *Conner* is confusing at best because the court there applied the clearly erroneous standard both to the district court's factual findings concerning the conduct of the parties *and* to the district court's conclusions regarding whether that conduct constituted a breach of the plea agreement. 930 F.2d at 1076-77.

3. Despite this intolerable conflict among the circuits on an important and constantly recurring[2] subject, the government opposes review by this Court and offers the unsupportable justification that the Court of Appeals would have reached the same result in this case even if it had reviewed the district court's decision *de novo*. Opp. at 11. Not only is there no affirmative basis for this bold hypothesis, the decision below directly contradicts it. The Court of Appeals obviously perceived that its selection of the clearly erroneous standard had a material, likely determinative, impact on the outcome of this case. It acknowledged the standard-of-review conflict among its sister circuits and devoted a substantial portion of its opinion to

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[2] Although the courts of appeals in " 'recent years [have] been repeatedly confronted with difficult questions concerning the interpretation and enforcement of plea bargains'," *Ataya*, 864 F.2d at 1329 (citation omitted); *see* Pet. at 19, "[t]his Court has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements." *Ricketts v. Adamson*, 483 U.S. 1, 16 (1987) (Brennan, J., dissenting).

explaining its choice among the opposing alternatives. Pet. App. 16a-19a. Having chosen the clearly erroneous standard, it repeatedly emphasized the significance of that choice to its decision. *See, e.g.*, Pet. App. 20a ("certainly we find no clear error"); *id.* 25a ("we do not believe that the district court's ruling on this point can reasonably be thought clearly erroneous"); *see also id.* 25a (pointedly criticizing the dissent for being insufficiently deferential to the district court).

4. The government also grossly mischaracterizes the issue presented by petitioner in Question 2 regarding the standard for collateral relief under 28 U.S.C. § 2255. Opp. at 12. Petitioner does *not* contend that the miscarriage-of-justice standard is inapplicable in § 2255 cases involving plea agreement breaches. Petitioner argues instead that that standard was rendered unattainable by the holding below that even if the government had breached a material inducement in the plea agreement, that conduct alone would not constitute a "fundamental defect" or miscarriage of justice. The court below rewrote the miscarriage-of-justice standard by erecting three additional barriers to relief in cases like this one, requiring proof not only that the government committed a "breach of a promise that induced the guilty plea," Pet. App. 28a, as required by *Santobello v. New York*, 404 U.S. 257, 262-63 (1971), but that the defendant establish also (a) that the inducement was "significant," (b) that the promise was "definite," and (c) that the violation was "clear." Pet. App. 28a (emphasis added). This new formidable standard placed the court below in conflict with other circuits that have followed *Santobello* and have held that "[t]he government may not breach any term of a plea agreement which induced the defendant to plead guilty," *Panzardi-Alvarez v. United States*, 879 F.2d 975, 986 (1st Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990), even in collateral relief cases. *See also* Pet. at 19-26.

The government dismisses the many decisions at odds with the court below by asserting that "[i]t does not appear in those cases that the government made a distinct argument concerning the heightened standard for relief under

[§] 2255." Opp. at 14 n.3. If nothing else, this statement reveals that the government has apparently not heretofore found it necessary to seek a collateral review standard comparable to that created by the court below, and that, until the decision below, no such separate standard existed. Indeed, the government did not even argue in this case for the formulation of the § 2255 standard applied to petitioner's claims: the court below *sua sponte* devised its three-level obstacle to relief. The dual standard that has been created by the decision below, and the confusion that it will inevitably cause, underscores the need for this Court to grant the writ to clarify the correct standard for collateral review of plea agreement violations.

The government cannot deny that the new § 2255 standard adopted by the court below for this case was the "decisive barrier" (Pet. App. 27a) to petitioner's claim that the government's bitter exegesis on petitioner's personal characteristics and beliefs violated its promise to limit its allocution to the "facts and circumstances" of his offense. Opp. at 13.[3] The government contends, however, that the § 2255 standard did not affect the other two claims because the court "rejected" on the merits petitioner's claims that the government breached the plea agreement by arguing for a life sentence and by failing to represent to the sentencing judge that petitioner's cooperation had been valuable to the government's enforcement of the espionage laws. But the government fails to recognize that, if this Court were to hold that a *de novo* standard of review applies rather than the clearly erroneous standard, there is a strong possibility that the court below would find that the government committed all three of the plea agreement vio-

[3] The government's highly inappropriate assertion that petitioner himself "violated the terms of the plea agreement," Opp. at 4, not only is completely irrelevant but flatly incorrect. The government at *no* time sought or obtained an adjudication of this question. Indeed, the government's remedy if petitioner did breach the plea agreement is rescission of the agreement—the remedy being sought by petitioner. It is not a license for the government unilaterally to repudiate and breach the promises it made to petitioner. *See, e.g., United States v. Simmons*, 537 F.2d 1260, 1261-62 (4th Cir. 1976).

lations alleged by petitioner. The collateral relief standard would then have a direct and unavoidable impact on Mr. Pollard's ability to obtain § 2255 relief predicated upon all three of the government's plea agreement violations.[4]

Finally, the government minimizes the impact of the special § 2255 standard adopted by the court below by recasting petitioner's contention in this case as a claim of "an *implicit* breach of the plea agreement resulting from the *tone* of the government's allocution." Opp. at 14 (emphasis added). The government is thus able to dismiss this case as simply a replay of *United States v. Benchimol*, 471 U.S. 453 (1985). There, the Court rejected the claim that the government breached a plea agreement for failure "enthusiastically" to make certain recommendations to the sentencing judge.

But this case does not involve "implicit" promises, the "tone" of the government's allocution, or the level of the government's enthusiasm. All three promises were explicit; all three were directly breached.[5] The government's be-

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[4] For example, under its heightened § 2255 standard, the court below declined to construe ambiguous provisions against the government and in favor of Mr. Pollard. *See* Pet. App. 25a-27a. This approach to plea agreement interpretation favors the government's position much more than that followed by other circuits in § 2255 cases. *See, e.g., Kingsley v. United States*, 968 F.2d at 114 (granting § 2255 relief for government's breach of ambiguous plea agreement while noting that "in determining the government's obligations under a plea agreement, we must hold the government to 'the most meticulous standards of both promise and performance' "); *United States v. Garcia*, 956 F.2d 41, 44 (4th Cir. 1992) (granting § 2255 relief for government's breach of ambiguous plea agreement while noting that "both constitutional and supervisory concerns require holding the Government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements").

[5] The government's brief inexplicably—and inexcusably—attempts to leave the impression that there may have been some dispute as to whether it promised to refrain from recommending a life sentence, Opp. at 11 n.2, despite the fact that the government has *never* contested that promise, the court below expressly found that it was "not in dispute,"

trayal of the three promises to petitioner that indisputably were material inducements to his plea of guilty had not a thing to do with the "tone" of the government's allocution. Its broken promises went to the very essence of petitioner's bargain—namely, whether the government would refrain from recommending that petitioner receive a life sentence, whether the sentencing judge would be told that petitioner's cooperation had been of "considerable value" to the government's enforcement of the espionage laws, and whether the government would limit its allocution to "facts and circumstances," rather than opinion, hyperbole, rhetoric and character assassination.

5. The government contends that the decision below that the "wiring" of petitioner's guilty plea to that of his seriously ill wife did not violate the Constitution is "[c]onsistent with the views of other courts of appeals." Opp. at 18. It is not. As petitioner has demonstrated, Pet. at 26-28, the courts of appeals have articulated widely varying interpretations of *Bordenkircher v. Hayes*, 434 U.S. 357, 364 n.8 (1978), in which the Court suggested that wired pleas might raise special procedural and substantive issues relating to voluntariness. The court below here gave the prosecutor the broadest latitude imaginable. *See, e.g.*, Pet. App. 14a ("Almost anything lawfully within the power of a prosecutor acting in good faith may be offered in exchange for a guilty plea."). But other courts have held that plea wiring imposes a heightened standard of good faith on the prosecutor, and that such a procedure may violate the Constitution even if the prosecutor was acting in good faith, thus requiring additional procedural protections to ensure the plea was voluntary. *See* Pet. at 28. This Court should grant the petition and resolve the issue to bring certainty to this difficult, important and rapidly expanding area of the law.

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Pet. App. 19a, and the government expressly conceded at oral agrument in the court below that, "[*w*]*e agreed not to ask for life.*" Tr. of Oral Argument at 51 (Sept. 10, 1991) (emphasis added).

September 15, 1992

Respectfully submitted,

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